REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS,

FROM TRINITY TERM, 50 GEO. III. 1810,
TO EASTER TERM, 51 GEO. III. 1811,

BOTH INCLUSIVE.

With Tables of the Cafes and Principal Matters.

By WILLIAM PYLE TAUNTON,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. III.

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AND J. COOKE, ORMOND-QUAY, DUBLIN.

1813.

JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

Right Hon. Sir JAMES MANSFIELD, Knt. Ld. Ch. J.
Hon. JOHN HEATH, Esq.
Hon. Sir SOULDAN LAWRENCE, Knt.
Hon. Sir ALAN CHAMBRE, Knt.

A

T A B L E

OF THE

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

N. B. The Cafes, the Names of which are printed in *Italics*, are printed or cited from MS. Notes.

Bumford,

Gaird-

Lawrence

Ramf-

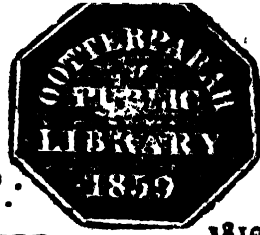
ERRATA.

Vol. I. pp. 378, 379. margin, for *Norden* v. *Williamson and Twibill*, read *Norden and Twibill* v. *Williamson*.

Vol. III. p. 61. line 26. dele "having."
65. 11. read *Plaintiff*.
127. 5. after "demise" insert a comma.
330. 1. for *Doe* on demise of *Hicks* v. *Compere*, read *Doe* on demise of *Compere* v. *Hicks*.
334. 1. the same error.

Directions to the Binder.

Vol. III. Cancel 14, 15, 16, 17, and insert *14, *15.



CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Trinity Term,

In the Fiftieth Year of the Reign of GEORGE III.

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COLLINSON and Others *v.* LARKINS.

June 22.

If a veffel is damaged by another running foul of it, and the jury find a verdict for the Plaintiff, the Court will not fend the cafe to a new trial becaufe there may be fome ground to believe that the Plaintiff was negligent in navigating his veffel, as well as the Defendant.

THIS was an action upon the cafe, brought by the Plaintiff, who was the owner of a veffel called the *Sufannah*, againft the Defendant, who was the owner of an *Eaft Indiaman* called the *Larkins*. The declaration charged that while the Plaintiff and Defendant were navigating their refpective veffels on the high feas, the Defendant, by his fervants, took fo little and fuch bad care of his fhip, in the direction and management thereof, that the fame, by and through the careleffnefs, mifdirection, and mifmanagement of the Defendant, by his fervants, ran foul of and injured the Plaintiff's fhip, whereby fhe was obliged to abandon her voyage, and make for the neareft port to refit. Upon the trial of this caufe at *Guildhall*, at the fittings after laft *Eafter* term, before *Mansfield* C. J., it was

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proved that the Plaintiff's veſſel was one of a numerous fleet, ſailing under convoy of the *Mercury* frigate; that they had general ſailing orders that no veſſel was to go before the *Mercury*'s beam; that on the 31ſt of *January*, the fleet then being in the chops of the *Channel*, about ſix in the evening, (the weather being hazy, the wind freſh, and the moon new,) the *Mercury* made a ſignal for all the veſſels of the convoy to paſs within hail, and ſhortened ſail in order to give them time to come up; that each veſſel as it ſucceſſively came up, in order to avoid ſhooting a-head of the *Mercury*, contrary to the general orders, was obliged to practiſe ſome manœuvre to enable her to lie by until the reſt of the fleet ſhould have come within hail, and until the *Mercury* ſhould again proceed on her courſe: that for this purpoſe the *Suſannah* firſt bore away for half an hour, and afterwards lay-to: that the Defendant's veſſel, which was of greater burthen, having on that evening joined the convoy, was proceeding to head the fleet, in conſequence, as the Defendants alleged, of an order iſſued by the captain of the *Mercury*; and that after it was dark, while the *Suſannah* was lying-to, directly athwart the courſe of the *Larkins*, with her head nearly to the wind, and all his ſails aback, and conſequently not in a condition to be put into inſtant motion to avoid any approaching danger; the *Larkins*, which was then ſailing at the rate of 7 or 8 knots an hour, with her larboard bow ſtruck the *Suſannah* about the midſhips, and did her conſiderable damage. Witneſſes who were on board the *Suſannah*, ſtated that they could diſcern the *Larkins* at the diſtance of nearly half a mile to the windward: that they, at that time, had a ſingle candle in a lanthorn on their own forecaſtle, and that they ſaw a light near the poop of the *Larkins*, but no other lights: that when they ſaw her coming down on them, the whole crew of the *Suſannah* hailed her as loudly as poſſible,

at

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at which time, if the crew of the *Larkins* had been attending to the ship's course, they could easily have passed either a-head or a-stern of the *Susannah*; but that the crew of the *Larkins* did not perceive their signals. It was proved, however, that the *Larkins* had three men on the look-out during that time; but the darkness of the night, and haziness, prevented their seeing the *Susannah*; and the wind prevented their hearing the voices of her crew, until before the collision, when a sailor on board the *Larkins* exclaimed that there was a ship close under her bows. The crew of the *Larkins* immediately did every thing that they could to divert her course, but the distance between the ships at this time not exceeding 200 yards, they could not so change her course as to keep her altogether clear of the *Susannah*, but their efforts diminished the injury, by causing the *Larkins* to come down obliquely, instead of directly on her. It appeared that two days after the accident, the captain of the *Larkins*, who was an officer of great experience, did receive orders from the captain of the *Mercury* to lead the fleet.

Shepherd Serjt., for the Plaintiff, upon these facts contended that the crew of the *Larkins* had been inattentive to their duty, and that their negligence was the cause of the accident. Remarks were also made on the date of the orders for the *Larkins* to take the lead. *Lens* Serjt., for the Defendant, on the other hand, relied on the circumstance of his having been acting in pursuance to orders of a superior authority in shaping his course as he had done; that the Plaintiff had been guilty of negligence in not displaying lights in a signal lanthorn, and in lying-to in the midst of a numerous convoy, a situation in which he ought not to have disabled himself from escaping such accidents as may unavoidably occur in a crouded fleet; much less ought he to have placed his vessel exactly athwart their course. The jury, however, found

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a verdict for the Plaintiff, subject to a reference as to the amount of the damage sustained.

Lens now moved to set aside the verdict, and to have a new trial. The utmost that was contended at trial for the Plaintiffs, he said, was, that the captain of the *Susannah* was not highly blameable in lying-to; but it is necessary that there should have been some positive misfeasance on the part of the Defendant to entitle the Plaintiff to recover in this action. He mentioned the case of *Buller* v. *Fisher*, *B. R.* 1798., which was an action brought against the Defendants, owners of the brig *Atlas*, for not delivering goods entrusted to them to be carried on freight on board that vessel, wherein a special verdict was found, that whilst the ship was proceeding on her voyage, the ship and goods were sunk in the sea, and wholly lost to the Plaintiffs, which sinking and loss was occasioned by the *Atlas* and a certain other ship called the *Patriot* running foul of each other upon the high seas, no blame being imputable to either of the said ships' companies. The cause, by the direction of the Court of King's Bench, then went down to another trial, in order to have it specially found whether the loss were occasioned by a peril of the sea or not. The Plaintiffs praying the direction of the Chief Justice, Lord *Kenyon*, whether, in law, these facts amounted to a peril of the sea; and his Lordship declaring his intention to leave it to the jury as a question of fact, whether these circumstances were a peril of the sea or not, the Plaintiff submitted to be nonsuited, and the case was never ultimately determined, and it is cited only for the sake of the general doctrine, that there must be something blameable on the side of the Defendant, in order to enable the Plaintiff to recover. But even if the Defendant were blameable here, yet if there were blame in both parties, and the misfeasance of both concurs to produce

Buller v. *Fisher*, *B. R.* 1798.

produce the mischief, then it follows as a consequence of law that the one can recover no damages against the other, and there ought to be a new trial upon that ground, because the action cannot be sustained.

MANSFIELD C. J. I should have no objection to this cause being tried again, if I thought any new light could be thrown upon it; and had I been on the jury I should have made such allowances for the darkness of the night, that I should have found for the Defendant, attributing the cause to mere accident, and a dark foggy night. There was some contradiction between the witnesses as to the distance at which the ships first discovered each other and hailed. It was attempted to insinuate that the Defendants tried to delude the Plaintiffs by concealing the name of their ship; but this insinuation was afterwards completely done away. Two masters of the *Trinity House*, who were present during the trial, thought that the *Susannah* did wrong in lying-to; but they thought that the *Larkins* did not do quite right in going seven knots an hour in the middle of a convoy, in a thick foggy night; because her going so fast might be the very reason why her crew could not prevent the accident; if she had been going slower they might have been able to wear ship in time. They therefore thought both parties were in some measure blameable.

HEATH J. *Interest reipublicæ, ut sit finis litium.*

LAWRENCE J. In this case it is evident, from the opinion of the gentlemen of the *Trinity House*, that the captain of the *Larkins* was acting very imprudently in running at this rate through the fleet; and we do not know but that the *Susannah* might have had very good reasons for lying-to.

Rule refused.

June 25.

WEBB *v.* BROOKE.

The Plaintiff and Defendant being taken prisoners in *Portugal*, jointly solicited and obtained the liberation of themselves and the ransom of the Defendant's ship, contrary to 45 *G*. 3. *c*. 72. to effect which the Plaintiff lent money to the Defendant, who afterwards gave him a bill for the amount. Held that the Plaintiff could not recover on the bill.

THIS was an action upon a bill of exchange for 3000 dollars, payable to the Defendant's order, by whom it was drawn upon *Parsons*, and indorsed to the Plaintiff, and which *Parsons* had refused to accept. This cause was tried at *Guildhall*, at the sittings after last *Hilary* term, before *Mansfield* C. J., upon the admissions of the parties, which were in substance, that in *April* 1809, Marshal *Soult*, Duke of *Dalmatia*, entered *Oporto*, and made prisoners of all the resident *English*, among whom were the Plaintiff, a merchant, and the Defendant, master of the ship *Little Mary*, together with his vessel. A petition was presented to *Soult*, in which the petitioners on behalf of themselves and their unfortunate countrymen, being few in number, and those few always employed in the merchant service, and not carrying arms against the Emperor of *France* or his allies, solicited their liberty; stating, that they had one vessel there in ballast, which would be sufficient to take them all to their country. And that they could not doubt but that on their return to their country, the *English* government would restore an equal number of prisoners of the same rank to *France*. An instrument was also drawn up between *Soult* and the other parties thereto, which set forth that the *English* captains, prisoners of war, and whose ships and cargoes were at that moment in the river *Douro*, confiscated by the laws of war, having been informed that the intention of his Grace the Duke of *Dalmatia*, governor-general of *Portugal*, was to render the commerce of *Portugal* as free, and on the same footing, as it had been before his entry with the *French* army, had offered to his Grace the Duke to re-purchase their ships and cargoes on the following terms: All the ships, on an

an average, 3000 dollars each; the pipe of wine at 106 dollars; and the quintal of corn at 2 dollars and a half; and the bale of cotton at 60 dollars; with the condition that his Grace would permit that Captain *Brooke*, of the *Little Mary*, might return himself to *England*, without delay, with his crew and passengers, for the purpose of negotiating with the company at *Lloyd's*, the owners of the ships and cargoes, or any other speculators, to remit, in *Spanish* dollars, the necessary funds for the payment for all *English* as well as other prizes that might answer their interest: and that the *English* captains who should remain in *Portugal* might continue in charge of their own respective vessels until an answer should be returned from *England*. And his Grace the Duke promised to the Defendant, or to any one else concerned in this transaction, permission to return to *Oporto*, or any other port in *Portugal* in his possession, with cargoes of boots, shoes, provisions, and other stores, for their own benefit; and to trade with the army as well as with the inhabitants of *Portugal*. And the Defendant and the rest of the passengers thereby obliged themselves to be responsible, that the same number of prisoners as themselves, with the crew, should be conveyed to *France* in exchange. Both these instruments were signed, as well by the Plaintiff and Defendant, as by several other *British* subjects. In order to carry into effect the arrangement contemplated by the two instruments above stated, the Plaintiff lent to the Defendant the sum of 3000 *Spanish* dollars, being 15,000 *Francs*, for which the receipt hereinafter mentioned was given. The Plaintiff accompanied the Defendant to the *French* commissioners of prizes at *Oporto*, for the purpose of paying the price agreed on for the *Little Mary*, but were referred by that board to the *French* paymaster of the forces. Accordingly, the Defendant, with the knowledge of the Plaintiff, but without his attendance, proceeded to *De Carcel*,

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the *French* paymaster, and paid him the said sum of 3000 dollars, and took of him a receipt, whereby he, the undersigned paymaster provisional of the army of *Portugal*, acknowledged to have received of Mr. *Brooke*, an *English* captain, conformably to the letter of the president of the commission of prizes, the sum of fifteen thousand *Francs* for the ransom which he had made of his ship named the *Little Mary*, taken in the river of *Douro*, whereof that should be his acquittance. (Signed) *De Carcel.* The *Little Mary* was in consequence liberated, and sailed, under the command of the Defendant, with the Plaintiff on board, to whom the Defendant, on the homeward passage gave, as security for the money he had lent, the bill upon which this action was brought; which bill was duly presented for acceptance, and refused; and due notice of the dishonor was given to the Defendant. The defence set up was, that the money was lent for an illegal purpose, the ransom of the *Little Mary*. Upon these facts the jury found a verdict for the Plaintiff; the Chief Justice reserving the point of law.

Shepherd Serjt., in *Easter* term, having accordingly obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the authority of *Clugas* v. *Penaluna*, 4 *T. R.* 466. and *Sullivan* v. *Greaves*, 1 *Marsh. Insur.* 49.; though he admitted the latter case somewhat militated with *Tennant* v. *Elliot*, 1 *Bos. & Pull.* 3.

Best, *Vaughan*, and *Onslow*, Serjts. on a subsequent day in this term shewed cause. The supposed illegality of this contract must be proved either by some express legislative prohibition, or by the authority of decided cases, or by some known principle of law. The stat. 45 *Geo.* 3. *c.* 72. (which repeals the former statute relative to the same subject, 43 *Geo.* 3. *c.* 160.) re-enacts in the

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the 16th section, that it ſhall not be lawful for any of his majeſty's ſubjects to ranſom, or to enter into any contract or agreement for ranſoming, any ſhip or veſſel belonging to any of his majeſty's ſubjects, or any merchandize or goods on board the ſame, which ſhall be captured by the ſubjects of any ſtate at war with his majeſty, or by any perſons committing hoſtilities againſt his majeſty's ſubjects, unleſs in the caſe of extreme neceſſity, to be allowed by the Court of Admiralty. And by the 17th section, all contracts and agreements which ſhall be entered into, and all bills, notes, and other ſecurities, which ſhall be given by any perſon or perſons for ranſom of any ſhip or veſſel, or of any merchandize or goods on board the ſame, contrary to that act, ſhall be abſolutely null and void in law, and of no effect whatever. And by the eighteenth section, if any perſon ſhall, contrary to that act, ranſom, or enter into any contract or agreement for ranſoming, any ſuch ſhip or veſſel, or any merchandize or goods on board the ſame, every perſon ſo offending ſhall, for every ſuch offence, forfeit the ſum of 500*l.* They contended that although this ſtatute renders the contract for the ranſoming illegal, and all ſecurities for it void, yet it does not avoid any except the principal contract, but acceſſary and auxiliary contracts may nevertheleſs be good, notwithſtanding that act. It is quite clear that this bill of exchange was not the contract of ranſom itſelf, nor is it an agreement for the ranſom, which are the only contracts vacated by the ſtatute. If the Court hold that it is, they muſt alſo hold that the Plaintiff has ſubjected himſelf by this bill of exchange to the penalty of 500*l.* given by the 18th section, which would be monſtrous. The ſtatute 16 *Car.* 2. *c.* 7. *ſ.* 3. vacates all ſecurities given, and all agreements for the payment of money exceeding 100*l.* won at play, but the Courts never held that contracts for the repayment of money lent for purpoſes of play were thereby rendered illegal; and even after another ſtatute 9 *Ann.*

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c. 14. f. 1. had been enacted for the exprefs purpofe of declaring void all fecurities given for the repayment of money knowingly lent to game with, the Court, in *Barjeau* v. *Walmfley*, 2 *Str.* 1249. held, that it did not vacate the contract of lending at the time and place of play for the purpofe of gaming. *Alcinbrook* v. *Hall*, 2 *Wilf.* 309. (a) The Plaintiff, upon requeft, paid for the Defendant a fum exceeding 10*l.*, which the latter had loft in a bet on a horfe-race, and was allowed to recover it. 4 *Burr.* 2069. *Faikney* v. *Reynous and Richardfon* (b). The Plaintiff paid money for differences upon a ftock-jobbing contract, contrary to the ftat. 7 *G.* 2. *c.* 8. A moiety of the money was paid for the ufe of *Richardfon*, who was partner in the contract, and the Defendants had both given bond for the re-payment. Upon demurrer, Lord *Mansfield* C. J. was clear that thefe facts being pleaded were no defence to an action on the bond, and the three other Judges concurred that it was a good bond. [*Lawrence* J. obferved that the diftinction there taken between *malum in fe* and *malum prohibitum* had been very often doubted.] *Petrie, Executor of Keeble*, v. *Hannay*, 3 *T. R.* 418. The Plaintiffs had paid a bill of exchange drawn by the teftator, in favor of *Portis*, a ftockbroker, on the Defendant, and accepted by him, but difhonored when due; and they now declared for money paid for the Defendant's ufe: the defence was, that as part of the fum claimed, the bill was given to reimburfe *Portis* for fo much money paid by him to divers perfons for the differences of fome ftock-jobbing tranfactions, in which the teftator, and the Defendant, and another, had been partners, and had experienced a lofs. The Court, with the exception of Ld. *Kenyon* C. J., held that the Plaintiff was

(a) See *Clayton* v. *Dilly*, *Mich.* term 1811, *poft.* vol. 4.

(b) *Burrow* entitles this cafe, *Faikney* v. *Reynous and another:* but it appears in 3 *T. R.* 419. *note*, that upon examining the record, that other was found to be *Richardfon.*

entitled

entitled to recover; and he had judgment accordingly. In this case the authority of *Faickney* v. *Reynous* was confirmed; and *Grose* J. particularly observed, that the action was not founded on a promise arising by implication of law out of the illegal transaction, but on an express one made subsequent, and which the Defendant was under no necessity of making (*a*). Here was an express subsequent promise. [*Mansfield* C. J. Suppose the Plaintiff, instead of lending the money to the Defendant, had, with his own hand, paid it to *De Carcel*; would an express subsequent promise to repay avail him?] It would have made no difference: *Portis* paid the differences for *Keeble*, yet he recovered against *Keeble*. Suppose another had lent money to the Plaintiff in order that he might lend it to the Defendant for this ransom: would that contract have been void? Where is the illegality to stop? *Steers* v. *Lashley*, 6 *T. R.* 61., where it was held a good defence to a bill of exchange, accepted by the Defendant, that it was originally created to pay the very differences on a stock-jobbing contract, is not a case adverse to the Plaintiff; for there the drawer, who was *particeps criminis* with the Defendant, could not transfer to his indorsee any more valid title to the contents of the bill than he himself had; especially as the indorsee had notice of the whole transaction: and Lord *Kenyon* there admitted the authority of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*. Here the Plaintiff does that which Lord *Kenyon* there expressly says might be done according to the authority of those cases. *Havelock* v. *Rockwood*, 8 *T. R.* 208. does not govern this case. There it was held that the Plaintiff could not recover from the underwriters for the loss of a ship, which ship, though it had been captured, the Plaintiff then had safe in his own possession, having re-purchased it under an illegal condemnation, which in effect was a ransom, an illegal payment

(*a*) See *Barnes* v. *Hedley*, *ante*, 2 vol. 184.

which

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which the Court could not permit him to charge on the underwriter, as money paid for his use, when it was made without his consent, and the total loss was at an end by the re-possession of the ship (*a*). In *Waymell* v. *Reed*, 5 *E. R.* 599., the Plaintiff was party to the original illegal smuggling transaction: it was not like this, a distinct auxiliary contract. The Plaintiff had nothing to do with the application of this money, though he knew of the purpose to which it was to be applied. [*Heath* J. He personally went to the commissioners of prizes to see to the due application of it, for the purpose of ransom.] The Court cannot decide against the Plaintiff's claim without going the full length of saying that no money lent can be recovered back, if the lender previously knew that it was to be applied to any prohibited purpose: which is contrary to *Alcinbrook* v. *Hall*, and to *Mitchel* v. *Cockburne*, 2 *H. Bl.* 379., where *Eyre* C. J. expressly says that the cases of *Petrie* v. *Hannay*, and *Faikney* v. *Reynous* were one step short of the illegal transaction. [*Lawrence* J. *Eyre* C. J. did not there say he meant to confirm those cases, but that *Mitchel* v. *Cockburne* did not come within the exception, even if they could be supported, which he evidently doubted, as did Lord *Eldon* C. J. in *Aubert* v. *Maze*, 2 *Bos. & Pull.* 372.; and Lord *Loughborough* Ch., in *Ex parte Mather*, 3 *Ves.* 373.; and Lord *Kenyon*, in *Steers* v. *Lashley*, only says, being pressed with those cases which he doubted, "if the circumstances were so and so, those cases might be applicable, but here they are not." Suppose you hire a horse, and tell the owner it is for the purpose of robbing on the highway, can he recover for the use of it? In 1 *Bos.* 340., *Lloyd* v. *Johnson*, it was held no answer to an action for washing a woman's clothes, that she was known to use them for frequenting public places for purposes of prostitution. But the act against ransoming was passed for purposes of

(*a*) See *Parsons* v. *Scott*, *ante*, vol. 2. p. 363.

public

public policy to induce our sailors to defend vessels to the last; but there is nothing immoral in ransoming: it is not like the case of a horse lent to rob on the highway.

Shepherd, who was prepared to support his rule, was stopped by the Court.

MANSFIELD C. J. Certainly there is a manifest distinction between the cases of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, and the other cases, in which a man having a debt of honor borrows money to pay it, and between those cases where the Plaintiff previously advances the money for effectuating an illegal transaction, or causing it to be done. I did not before know that the first class of cases had been shaken: but they are very different from this case. For here I know not how to distinguish the Plaintiff from the Defendant: the persons being all in the same situation, are all equally to be benefited by this transaction; all equally solicitous to procure it; (for they were all to come home by the *Little Mary*;) and it is agreed that the Plaintiff is to advance this money. The Plaintiff and Defendant go together to the *French* commissioners of prizes, who refer them to the paymaster; the Defendant goes alone thither, and trusting to the honor of his owner, and hoping that the owner could recover it, as he attempted, against the underwriters, pays this money. How does this differ from a partnership in a smuggling transaction, where one advances more than his share of the money? And how can we distinguish the Plaintiff and Defendant? The Plaintiff is as much the ransomer as the Defendant, and the Defendant as the Plaintiff; and it would be singular, where two are equally interested in wishing and effecting a ransom, if, because it happens that one advances the money, and takes the bill of the other for the re-payment, that shall be good; while if the bill were

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given to the captor only, it would be void; therefore, without at all going into the consideration of *Faikney* v. *Reynous*, and the other cases, it seems impossible to say that the ransom is not as much the deed of the Plaintiff as of the Defendant.

Rule absolute to enter a nonsuit.

June 25.

LAWRENCE v. HEDGER.

Watchmen and beadles have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed.

BEST Serjt. moved to set aside the verdict which *Mansfield* C. J. had directed, upon the trial of this cause at *Guildhall*, at the sittings after last *Easter* term. It was an action of trespass and false imprisonment; and the case was, that the Plaintiff passing through the streets of the city of *London*, in the ward of *Cripplegate*, with a bundle in his hand, about the hour of ten o'clock at night, was stopped by a watchman, who took him to the watch-house, where the Defendant, a beadle, was in attendance, who asked him what he had in his bundle, and who gave it him? He replied to both questions, he did not know, but was carrying it to his sister in *St. George's Fields*; and referred him to a house there, at which he might enquire for proof of his veracity. The beadle did not send thither to enquire, but sent the Plaintiff to the *Poultry Compter*, not charging the gaoler with the prisoner in the Defendant's own name, but in the name of *Stevens*, who was the constable of the night, but who was not, as he ought to have been, in attendance at the watch-house when the Plaintiff was brought thither; and the Plaintiff was, the next morning, carried before the sitting alderman, and discharged. Constables are chosen in the respective wards by the inhabitants, by custom, not under the authority of an act of parliament: a greater number is chosen in one ward

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ward than in another. In *Cripplegate* there are eight conſtables. In every ward there is a beadle, not choſen by the inhabitants, but appointed by the aldermen: the ſame perſon is uſually choſen and ſworn in conſtable alſo, as the Defendant was. An act paſſed 10 *Geo.* 3. for regulating the police of *London*, gives a power to apprehend malefactors and ſuſpected perſons, and directs that a certain number of conſtables ſhall attend at the watch-houſe every night according to a rota therein referred to, which is not fixed by law, or appointed by the aldermen, but by the inhabitants. The act directs that watchmen apprehending perſons ſhall carry them to the conſtable of the night, who ſhall carry them before a magiſtrate. This action was brought againſt the Defendant for this detention and impriſonment; and it was contended that the power being given to the conſtable of the night only, the beadle had no authority to detain and impriſon him. On the other hand, it was urged, that the defendant was ſufficiently a conſtable for the performance of this duty; and *Mansfield* C. J. was of opinion that, without the aid of this act, any watchman might detain the Plaintiff, and carry him to a conſtable; and that it would be the conſtable's duty to ſecure him when ſo apprehended.

HEATH J. It would be extremely miſchievous if it were not ſo. At every *Old Bailey* ſeſſions numbers of perſons are convicted in conſequence of their being ſtopped by watchmen while they are carrying bundles in this way.

LAWRENCE J. A woman walking up and down the ſtreets to pick up men, a night-walker, may be apprehended: yet her's is a much leſs offence than is here ſuſpected. In 2 *Burr.* 164. *Rex* v. *Bootie*, is an indictment

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ment against a constable for suffering a street-walker, taken up by a watchman, to escape.

CHAMBRE J. The case of *Samuel* v. *Payne*, *Doug.* 359. was an arrest even in the day time, which was much stronger: but in the night, when the town is to be asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise.

Rule refused.

June 26.

GAIRDNER and Another *v.* SENHOUSE.

Upon a policy from *London* to *Trinidad* or the *Spanish Main*, with leave to call at all or any of *West India* islands or settlements, and with liberty to touch and stay at any ports or places whatsoever and wheresoever, the assured must take all the ports at which he touches, in the same succession in which they occur in the course of his voyage insured.

But if he is lost in steering for an island not in the outward course of his voyage to *Trinidad*, it is a question for the jury to consider, whether he had not abandoned the intention of going to *Trinidad*, and restricted himself to the residue of the voyage only.

If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named.

If they are not named in any order in the policy, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, not according to the shortest geographical distances.

THIS was an action upon a policy of insurance on a voyage at and from *London* to *Trinidad*, and any port or ports of discharge in the *Spanish Main*, all or either, with leave to call at all or any of the *West India* islands or settlements, *Jamaica* and *St. Domingo* excepted. And the insurance was declared to be on goods on board the *Good Hope*, with liberty to touch and stay

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at any ports and places whatsoever, to seek, join, and exchange convoy, and to land, load, barter, and exchange goods, and take on board freight wheresoever she might call or touch at, without being deemed a deviation, and without prejudice to that insurance, at a premium of 10 guineas *per cent.*, to return 4 *per cent.* for convoy to the islands, and 1 *per cent.* for convoy from thence the remainder of the voyage, and arrives, or 2 *per cent.* if the voyage ends at *Trinidad.* Upon the trial of this cause at *Guildhall*, at the sittings after *Hilary* term 1810, before *Mansfield* C. J. the Defendant's subscription was admitted, and the Plaintiff proved an adjustment, which was a surprize upon the Defendants, who in consequence were obliged to call the Plaintiff's witnesses to prove the case, which they relied on it, that the Plaintiff would be forced to prove, and upon whose testimony it appeared that the ship sailed from *Gravesend*, with her cargo, consisting of various articles, destined for a market, (which it was supposed the then expected capture of *Martinique* would afford,) under convoy of the *Naiad* frigate, until the 3d of *April*, when the vessels bound for *Surinam*, *Berbice*, and *Demarara*, and among them the *Good Hope*, by signal, parted company from the frigate, (which was bound for *Barbadoes*,) and proceeded under convoy of a sloop of war to *Demarara*, and from thence, after two days, ran down in sight successively of *Tobago*, *St. Vincents*, and *St. Lucia*, and touched at *Martinique*, and, after four days stay at the latter island, finding no market, shaped her course for the island of *St. Thomas*, passing by *St. Kitts*; and in the night of the following day struck on the *Anegada* reef, where the ship was lost, but the cargo was saved and brought in other vessels into *Tortola*, by which misfortune on average loss of 62 *per cent.* was incurred. The master had received, neither at home nor at any of the abovementioned ports where he called for instructions,

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any orders to proceed to *Trinidad* or the *Spanish Main*. The defence set up was that the vessel was guilty of a deviation; for that she was not entitled to touch at the islands and settlements in any other order of succession than the geographical order in which they lay in the map, computing the shortest distances from one to the other; and calling first at that which was nearest to *England*; or, otherwise, that the assured was bound to take them in the order in which they were named in the policy: but it was in evidence that it was extremely easy to run down in a few days before the wind from either of the settlements to the islands which lay more to the leeward, but that it was a course of great delay and difficulty, again to beat up against the wind from the leeward islands to the *Spanish Main*; and assuming that the vessel was still intended to go to the *Spanish Main* or *Trinidad*, or some other of the settlements or islands to windward, it would be a deviation to run down the wind to *Martinique* or *St. Thomas*'s first, and then to beat up to windward afterwards, inasmuch as, although a liberty was given of touching and trading at all the islands, *St. Domingo* and *Jamaica* alone excepted, yet that liberty must be exercised by touching at those ports which the ship meant to touch at, in the same successive order in which the several places occurred in the usual and natural course of the voyage, without going backwards and forwards. It was in evidence, that it was not usual to go to *Trinidad* in order to go to the *Spanish Main*: that a vessel might have made *Trinidad* from the *Spanish Main* in two nights, but that in beating up from that island to *Demarara* on the *Spanish Main*, a month might possibly be consumed: that *Demarara* therefore was in the way to *Trinidad*, and also to *Martinique*; for an experienced seaman said, that if he were going to *Demarara* and *Martinique*, he should go to *Demarara* first: that *St. Domingo* and *Jamaica* would be out of the way to the *Spanish*

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Main. *Mansfield* C. J. was of opinion that under these circumstances, and considering the extensive liberty given by the policy, the Plaintiff might take the islands and settlements in the order most convenient for himself, and was warranted in pursuing this course; and the special jury found a verdict for the Plaintiff.

Vaughan Serjt. in *Easter* term had obtained a rule *nisi* to set aside the verdict and have a new trial, upon the ground that as this policy did not contain the words "backwards and forwards," the ship taking a homeward direction, before she had reached her ultimate port of discharge, on her outward voyage, was a deviation according to the cases of *Lavabre* v. *Wilson*, 1 *Doug*. 284. and *Hogg* v. *Horner*, 1 *Marshal on Insurances*, 191. He observed that *St. Domingo* and *Jamaica*, the excepted islands, were in the direct course of the voyage from *England* to the *Spanish Main*, which greatly strengthened the inference that the liberty was to call at the islands only in the order in which they occurred in the course of the voyage.

Shepherd and *Best* Serjts. in this term shewed cause. This vessel was travelling completely within the protection of the policy, which gave her liberty to go to all ports in the *Spanish Main*, and all islands except *St. Domingo* and *Jamaica*. The trade winds which prevail in those seas, effect, that a person who should first go to the *northernmost* island, and thence to the *southward*, would be as many months in performing the voyage, as he would be days if he first went to the *southermost* point. *Demarara* was a port permitted by the policy, for though it is not a part of the *Spanish Main*, which lies only between *Vera Cruz* and the *Oronoko*, it is one of the settlements, (intending *British* settlements,) mentioned in the policy, of which there are but three, *Demarara*, *Berbice*,

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and *Surinam*. The terms of the policy are very large and peculiar: it points out no successive order in which the several ports are to be approached. [*Mansfield* C. J. It seems to resemble the *East India* policies, which have the words backwards and forwards.] If the Plaintiff had a right to go at all to *Demarara*, he had a right to take that and the islands in the same relative order in which all ships take them; and incontestably the best course a sailor can take, is, to go to the *southernmost* point of the voyage first, and then to run down to windward: and this is the course which occasions the least risk to the underwriters; but this policy in truth entitles the Plaintiff to visit the several ports and islands in whatever order of succession he prefers.

Cockell and *Vaughan* Serjts. in support of the rule. The Plaintiff must exercise the liberty of calling at all these several ports and islands, by calling at them in the course of the voyage insured, which is from *London* to *Trinidad* and the *Spanish Main*. The Defendant does not complain of the ship going to *Demarara*, but the deviation began from her leaving *Demarara*, whence she ran down to *Martinique* and *St. Thomas's*. If from *Demarara* she had run home, the underwriters would have had no cause to complain, because the sooner the outward voyage is determined, the better; but if she turned about at *Demarara*, without proceeding to the *Spanish Main*, she can afterwards call only at ports which lie in the homeward course of the prescribed voyage. It was in evidence, that for a ship leaving *Demarara* to go to *Martinique*, would be entirely out of her course from *Demarara* to the *Spanish Main*. Being at *Demarara*, she should have steered by *Tobago* for the *Spanish Main*. [*Lawrence* J. What say you to the exception of *St. Domingo* and *Jamaica*? Could it be said that they are in the course of the voyage? Yet a ship easily runs down

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from either of those islands to the *Spanish Main*, which lies to leeward of them.] If the assured made his election to go to *Demarara*, he thereby abandoned those parts of the voyage which he had liberty to take in his course to *Demarara*; he might have taken *St. Thomas*, the *Virgin* islands, where the ship was lost, and *Martinique*, in their geographical order in going out, and it would have been no deviation, but he takes them after leaving *Demarara* in the homeward course, and then goes out to the *Spanish Main* again. Besides the cases of *Lavabre* v. *Wilson*, and *Hogg* v. *Horner*; it was held in 6 *Term Rep.* 531. *Beatson* v. *Howarth*, on a policy at and from *Fisherrow* to *Gottenburgh*, and back to *Leith* and *Cockenzie*, that although *Cockenzie* was a bad harbour and *Leith* a secure one, and by discharging goods at *Leith*, the vessel would be lighter and less endangered in entering *Cockenzie*, yet as *Cockenzie* lay the nearest in the course of the voyage, it was a deviation to touch at *Leith* first, and thence go to *Cockenzie*. *Marsden* v. *Reid*, 5 *East*, 572. Policy at and from *Liverpool* to *Palermo*, *Messina*, *Naples*, and *Leghorn*, provided the *French* should not be at *Leghorn*, the ship cleared out for *Naples* only, and it was urged there was no inception of the voyage insured; but as she was captured before she came to the dividing point, Lord *Ellenborough* C. J. held that the risk was covered, but that if she had gone to more than one of the places named in the policy, she must have taken them in the order in which they were named. [*Heath* J. There is something particular in this policy, which has not been noticed, that the assured might end where he pleased: he might have ended at *Trinidad*, if he had pleased, or he might end at *St. Thomas's*; and it would have been a proper point to leave to the jury, whether he had not abandoned the residue of the voyage, seeing whither he is bound, and having no orders for *Trinidad*, nor any cargo for *Trinidad*. *Lawrence* J.

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The defendant's beſt argument is to contend that the voyage was over, and that the ſhip was loſt, not on her outward voyage, but on her homeward voyage, which was not inſured by this policy.]

Cur. adv. vult.

On the following day the opinion of the Court was delivered by

MANSFIELD C. J. The ſhip having got to *Demarara*, ſhe ſeems to have given up all idea of going to the *Spaniſh Main*; for ſhe is going to *Martinique*, and the captain had no inſtructions for *Trinidad*, either from *England* or *Demarara*: and the touching at *Martinique* ſeems, as far as I can judge, quite inconſiſtent with the proſecution of the voyage to *Trinidad* or the *Spaniſh Main*. The ſhip thence goes to *St. Thomas*, probably for a commercial purpoſe, but it is quite out of the voyage to *Trinidad*: and it ſeems alſo out of the voyage to the *Spaniſh Main*. At the trial the Defendant was not ſo well prepared for trial as might be, for reaſons of ſurprize which he has aſſigned: the aſſured contended at trial that he had a right to go to *St. Thomas's* firſt, and then to *Trinidad*, as within the liberty; and I directed the jury accordingly: ſo that it has never been left diſtinctly to the jury, whether the ſhip was in her voyage to *Trinidad* at the time of her loſs; and though at the trial I was ſtruck with the largeneſs of theſe words, as giving liberty to the ſhip to go any where ſhe pleaſes, to any iſland, in any courſe, it muſt be confined to the voyage inſured, that is, to ſome port in the courſe of the voyage to *Trinidad* and the *Spaniſh Main*; otherwiſe I do not ſee where the voyage is to end: they might make it laſt two years, by going to every *Weſt India* iſland, except *St. Domingo* and *Jamaica*: and the larger the words are, the more neceſſary is this conſtruction, elſe the ſhip might trade and barter without any termination; it is therefore

therefore very fit there should be a new trial in this cause, not waiting for another cause to be tried; and as it was not tried owing to my misunderstanding of the policy, it must be without costs. *Lavabre* v. *Wilson* is very strong, and the case of *Hogg* v. *Horner*, in *Marshal*, is prodigiously strong, for the number of ports in *Portugal* being very small, and the extent of the coast short, there is the less necessity for the restriction of taking it in the course of the voyage from *London* to *Portugal*: but for these reasons we think this liberty must be restricted to places to be taken in the course of the voyage from *London* to *Trinidad* and the *Spanish Main*, and that there must be a new trial.

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Rule absolute.

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No way, or other easement, can subsist in land of which there is an unity of possession.

But if a lessor, having used convenient ways over his own adjoining land during his own occupation, demises premises with all ways appurtenant, unless it be shewn in evidence that there was some way appurtenant *in alieno solo*, to satisfy the words of the grant, it shall be intended that he meant the ways used, and they shall pass, though he miscall them appurtenant. *Per Mansfield* C. J.

MORRIS *v.* EDGINGTON.

THIS was an action brought by a tenant against his lessor upon the covenant in a lease for quiet enjoyment, and charging the Defendant with having obstructed a way thereby demised. The Defendant, by his lease, demised all that part of all those messuages or tenements and premises called the *Bear and Ragged Staff* in the north-east corner of *West Smithfield*, situate on the west side of the gateway or entrance to the premises; and also so much of the said messuage as extends over the gateway, and the room or apartment adjoining to the gateway on the east side thereof, then lately used as a kitchen to the said messuage, but then converted into a tap-room, and the cellar below the same; together with full ingress, egress, and regress out of and into the yard of the lessor, lying beyond the said gateway, at all seasonable times of the day, with horses and carts, for depositing porter, wine, and liquors in the cellars, and taking away the casks, [this was not the right of way which was charged to have been obstructed,] and all other ways and easements to the said devised premises belonging and appertaining. "Except and reserved to S. Toomer, (the ground landlord,) and to the Defendant,

An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity. *Per Mansfield* C. J.

Whether a way of necessity shall be the way most convenient to the lessee? *Semb. acc. per Mansfield* C. J.

A lease demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land, in one of two directions, the one by entering it from the residue of the demised premises; the other, and far the more convenient, by entering it from a public street; held that the lessee was entitled to a way across the reserved land from the public street to that part.

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all other premises not thereby particularly demised, and also reserving the said gateway or entrance, and the yard, and the warehouse then lately erected over the same, occupied by *Palthorpe*, subject to the right of way and passage aforesaid, and all the buildings on the east and north sides thereof. The Defendant pleaded, first, that he suffered to enjoy: secondly, that he did not obstruct. Upon the trial of this cause, at the sittings after *Hilary* term 1810, at *Guildhall*, before *Mansfield* C. J., it appeared in evidence that the yard and warehouse reserved in the lease were used by common carriers, who unloaded their waggons and deposited valuable goods there: that the approach thereto was through the the reserved gateway, and thence forward; and that the most obvious and usual approach to the tap-room from the public street was through the same gateway, upon entering which the door of the tap-room was seen on the eastern side of it, with a finger-board fixed up, which had been placed there while the lessor occupied the premises, pointing and directing "to the tap-room." That for the security of the carrier's goods deposited in the yard, the defendant caused the great gates of the gateway or entrance, which abut upon the public street, to be closed every night between six and seven o'clock, and refused after that time to open them for the admission of persons frequenting the tap-room. The Plaintiff himself had formerly kept this public-house, and converted the kitchen to a tap-room, and while he kept it himself, and until, and at the time of making this demise, the access allowed for customers to the tap-room was the obvious and public one of entering from the public street through the gateway mentioned in the lease, which at that time was not accustomed to be closed till ten or eleven at night. It was proved that on the western side of the gateway was a coffee-room, having a door in front, opening to the public street, for persons frequenting it

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to enter; and communicating with the residue of the demised messuage by a door on the back part of the coffee-room, the coffee-room communicated with one end of a passage which ran behind it, and the other end whereof communicated with the reserved gateway; being the passage through which dinners were conveyed from the tap-room, while it was the kitchen, to the coffee-room, and through which liquors from the tap-room were still brought thither; so that when the great gates were closed, persons might enter the coffee-room from the street, go through it into this passage, and along this passage into the gateway, and crossing the gateway, would find themselves in the tap-room; but this approach to the tap-room being less public and obvious, invited fewer customers at night after the great gates were shut, and the Plaintiff had in consequence experienced a loss in his trade. The defendant contended, that the exceptions in the lease precluded the Plaintiff from using any right of way, except the right of way to the cellar through the gateway with liquors, which was expressly granted to him, and the right to enter the demised premises through the public door of the coffee-room, and from thence to go by a way of necessity from the western part of the messuage across the reserved gateway to the tap-room: for the plaintiff it was contended, that he was entitled to have access to the tap-room from the street through the gateway at all times, and the jury found a verdict for the Plaintiff.

Shepherd Serjt., in *Easter* term, moved for a rule *nisi* to set aside the verdict and have a new trial, upon the ground that it appeared by the evidence, that no such way was demised as the way which was proved to be obstructed. The lease, granting only one specific right of way up the gateway for certain specific purposes, and reserving the soil of the gateway itself, subject to the right

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right so expresly granted, evidently disaffirmed the existence of any other right of way over that soil, than the way expressed, for *expressio unius est exclusio alterius;* and the tenant could not claim it as a way appurtenant, inasmuch as a lessor cannot have an easement appurtenant to be exercised in his own land, and consequently cannot demise any, *eo nomine:* but even if he could, this express definition of what ways shall be granted aud pass thereby, over-rides and curtails the effect of the general words. He had a way to his tap-room through his other premises, therefore he was not entitled to this as a way of necessity. The Court granted a rule *nisi.*

Lens and *Best*, Serjts., in this term shewed cause. They contended that every species of enjoyment of the premises which the lessor used before the lease, would pass by the words belonging and appertaining; they are equivalent to a demise, *tam amplo modo* as the lessor before held the premises. [*Heath* and *Chambre* Js. Where that is intended, is it not usual to express it by the phrase "therewith used?"] The lessor left in the gateway a finger-board, directing "to the tap-room:" so that if he did not mean to pass this way, he was practising a fraud upon the Plaintiff. *Archer* v. *Bennet*, 1 *Lev.* 131. Where one seised of two mills for grinding oatmeal, and part of a close, on which was a kiln for drying the oats, sold the mills, *cum pertinentiis*, *Wyndham* J. held, that the kiln might pass as part of the mills. And by the grant of a messuage, conduits and water-pipes, laid in the vendor's land, will pass as parcel, although they are remote. *Nicholas* v. *Chamberlayne*, *Cro. Jac.* 121. acc. And that, though upon sale of the house, the land be excepted, or upon sale of the land, the house be excepted; and the conduit and water-pipes pass with the house, because it is necessary and *quasi* appendant thereto. *Gennings* v. *Lake*, *Cro. Car.* 169. Land may be appertaining to a house,

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house, as well in the King's case as of a common person, where it hath been let and occupied for a convenient time. The reservation in the lease and the special grant prove nothing, for the broad door of the cellar, through which only the butts of liquor could be conveyed, was in the yard reserved, beyond the gateway, so that a special grant might be necessary to give him an extraordinary mode of access to that door; but it does not therefore follow, that the expression of that special and particular way over the soil of the gateway, excludes this, to which the Plaintiff is entitled as one of the ordinary and necessary ways of approach belonging to the premises. [*Lawrence* J. Does not the Defendant's argument extend equally to preclude the access from the coffee-room and the residue of the messuage to the tap-room? Both approaches, being across the gateway, would be equally cut off. *Mansfield* C. J. What is the meaning of the word necessary in this case? It is possible to get to the tap-room another way, through the coffee-room; but if it means necessary for the most convenient enjoyment of the tap-room, the one way as necessary as the other. *Lawrence* J. The way granted for liquors is a way through the reserved private yard, and the grant says nothing about a way through the gateway.] It is therefore unnecessary to labour the point, that this way is not excluded by the expression of the other way; and this way, inasmuch as it was before used by the lessor, passed to the plaintiff. This case is very distinguishable from *Clements* v. *Lambert*, *ante*, i. 205. A way is not like common: the one is a *profit apprendre*, the other merely an easement. [*Lawrence* J. In strictness of law, both are extinguished by unity of possession.]

Shepherd in support of his rule. There is no distinction between common and way in this respect; both must be claimed either by prescription or grant. The question upon these issues is, whether the Defendant has inter-

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interrupted the plaintiff in the exercise of any right, which was demised to him, either as appurtenant, or as especially granted by this lease. If the words therewith used had been inserted here, ways extinguished by unity of possession would have been thereby revived and would pass. *Clements* v. *Lambert* is directly in point: the words "belonging and appertaining" were there employed, which were insufficient, and it was held that if the deeds had contained the words "therewith used," it would have sufficed. This way was in like manner used and enjoyed at the time of the demise, as that common was, but it was not a way appurtenant or belonging, because it was over the land of the same owner. *Archer* v. *Bennett* does not apply, for the question was there made, whether the kiln could pass as appurtenant to the mill, and it was held it could not, for that land could not be appurtenant to land, though it might pass as parcel. It is not necessary to enquire, whether the opinion of *Wyndham* J. was sound law, but it is not applicable here. *Bradshaw* v. *Eyr*, *Cro. El.* 570. and *Worledg* v. *Kingswell*, 2 *Anderson*, 168. S. C. *Cro. El.* 794. are according. [*Mansfield* C. J. What right of way to the tap-room had the plaintiff, if he had not the way contended for?] It does not necessarily follow that any way was expresly demised; and if none was demised, the law would give the plaintiff a way of necessity; but he could not upon these issues recover for obstructing a way of necessity. Upon the face of this lease it certainly was intended to prevent the party's having the same access from *Smithfield* to the premises which had been formerly used: for there is an express demise of a way for horses out of and into the said yard, to convey liquor to and from the cellar, at all seasonable times of the day: but if the plaintiff's argument is right, all these words were superfluous, for he had all these privileges without any specific grant, inasmuch as the defendant, while

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while he occupied the premises himself, used his cellar as well as his tap-room, and he has not more expressly reserved his yard than his gateway. [*Lawrence* J. In order to get to the yard, and to use the right of way up the yard, the plaintiff must first go through the gateway: yet he grants no right of way up the gateway, not even to go with liquors to the cellar, but the right of way granted is over the yard only; and the other clause, which reserves the gateway, subject to the said right of way to the cellar, proves nothing by proving too much, for it equally destroys the right of way to the tap-room from the coffee-room.] It is not necessary to dispute that; the issue here is, whether we have obstructed a way demised by the lease, which the Defendant has not done. If the Defendant obstructs the plaintiff's way of necessity, he has another remedy by action on the case, it is not by an action on this covenant. And it does not follow, because the Defendant is not at liberty to obstruct the path which goes across the gateway from the tap-room to the coffee-room, that he therefore may not obstruct the access from *Smithfield* to the tap-room. The Defendant, therefore, is entitled to a new trial.

MANSFIELD C. J. The case certainly has admitted of some curious argument, and very well bottomed in the case of *Clement* v. *Lambert*; and no doubt a right of way, like a right of common, must be claimed as appurtenant; and if either hath been extinguished by unity of possession, it will no longer pass by the name of appurtenant: but there is a wide difference between a lease or a grant with easements over other foreign land, and a grant where the easements are in the lessor's land. All deeds are to be most strongly taken against the maker; and all deeds and writings are to be taken *secundum subjectam materiam.* Now what is the case here? There is no way that we hear of, at all, belonging to these premises,

mises, except the way over the land in question. Now, as we hear of no other ways, and as it is impossible that these parties, who are (*a*) supposed necessarily to understand the law, could suppose these ways were ways appurtenant: they therefore meant them, being the only subsisting ways, by the improper name of ways appurtenant. I say nothing of what is a way of necessity; I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had. Then what are the circumstances of this case? First, it is much more convenient for any one to go to the tap-room through the gateway than through the coffee-room. And it is much more convenient to carry out beer through the gateway than through the coffee-room. Can it then be doubted that the intent was to give the same use of the way over the gateway, as the lessor before used to have? An argument has been built on the reservation of the gateway and yard, subject to the right of way with carriages and liquors to the cellar: but that is a particular sort of way, and has no connexion or reference at all with this way contended for, or the use of the tap-room. It is said, if this was a necessary way, it could not pass by this deed; that I do not at all understand; if there be any right of way at all, it must pass under this lease, under which the Plaintiff holds the premises. The argument founded on the expression of the special right of way goes too far; for if it deprives the Plaintiff of this way, it deprives him of all ways to the tap-room. This does not at all break in upon or affect the authority of *Clements* v. *Lambert*, and the other cases, on which it is held that easements are extinguished by unity of possession.

(*a*) *Sed vide* the doctrine of *Vaughan* C. J. that it is not necessary the lessor and lessee should understand what are covenants in law, *Hayes* v. *Bickerstaffe*, *Vaug.* 126.; cited with approbation by the Master of the Rolls in *Fitzgerald* v. *Faucomberg*, *Fitz.* 219.

LAWRENCE

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MORRIS v. EDGINGTON.

LAWRENCE J. Your argument derived from the exprefs grant of the right of way to the cellar does not ftand on good foundation: if that had not been granted efpecially, a general right of paffage through the yard to and from the cellar for all purpofes might have paffed, not only to and from *Weft Smithfield*, but to and from other places; fo that it was for the leffor's intereft that a fpecial grant was introduced as a reftriction.

Rule difcharged.

June 27.

HURST *v.* HOLDING.

A broker purchafes goods on commiffion at a month's credit, and pays duties on them, and fends them to the place of the purchafer's abode, configned to his own order: The feller being fearful of the purchafer's credit, procures the broker to delay the arrival of the goods till the month's credit is expired, and to tender them to the buyer on payment of the price, whereupon they are refufed. Held that the broker can neither recover the price, duties, or commiffion, in an action for money paid.

THIS was an action for money lent, and upon an account ftated. Upon the trial of the caufe at the *Guildhall* fittings after *Hilary* term 1810, before *Mansfield* C. J., the proof was, that the Defendant, who refided at *Liverpool*, having written to the Plaintiff on the 7th of *February* to purchafe him 33 bags of damaged *Surat* cottons at 23*d. per* lb., to be paid for in one month, with the ufual *Eaft India* Company's allowance; the Plaintiff, on the ninth, bought cottons for lefs than the price named, to be paid for in one month; and at the time of the fale paid 87*l.* 12*s.* for cuftom-houfe duties, and 61*l.* more, as the allowance to the *Eaft India* Company, and, on the 11th, fent the cottons to the *Axe* Inn in *Aldermanbury*, to be forwarded by the *Paddington* Canal to *Liverpool*, but with inftructions to deliver them to the Plaintiff's order. They were forwarded on the 18th from the *Axe*. *Whitley*, who had fold the cottons, afterwards hearing rumours difadvan-

tageous

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tageous to the credit of the Defendant, applied to the Plaintiff to stop the cottons, who, in consequence, on the 27th, gave directions at the *Axe* Inn that the cottons should not be delivered to the Defendant otherwise than upon payment of the price. The person who received this order wrote to his agent in *Liverpool* accordingly on the same day, and the goods did not arrive in *Liverpool* till the 10th of *March*, when the month's credit was expired. The carriers at *Liverpool*, by the Plaintiff's direction, upon the day after their arrival, tendered the cottons to the Defendant, upon payment of the money, but he refused to accept them or pay for them: upon which the Plaintiff, who had in the mean time on the 11th of *March* paid *Whitley* 407*l.* 12*s.* 4*d.* for the price of the cottons, by the same agent sold them on the 19th of *May* by auction at *Liverpool*, for the account of the Defendant. It was in evidence, that the Plaintiff was in the practice of buying cottons, as broker, for the Defendant; and it was alleged that his usual course of dealing was to send them to the *Axe* in *Aldermanbury*, to be forwarded to *Liverpool* to be delivered to his own order. This action was brought to recover the price of the cottons, which the Plaintiff had paid to *Whitley*; the duties he had paid at the custom-house; the allowances he had paid to the *East India* Company; and his own commission for purchasing them. *Mansfield* C. J. thought he was not entitled to recover either; and the jury, under his direction, found a verdict for the Defendant, with liberty to move to enter a verdict for the Plaintiff for 87*l.* 12*s.* the amount of the duties paid at the custom-house, if the Court should be of opinion that he was entitled to recover that sum.

Vaughan Serjt. in *Easter* term moved, as well upon the point reserved, as upon the ground that the plaintiff was

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entitled to recover the commiſſion, which he had earned by making the purchaſe, at a time anterior to any miſconduct in himſelf, and which he could not forfeit by what happened afterwards.

Shepherd, and *Best*, Serjts., on this day, ſhewed cauſe againſt the rule on both grounds: the goods being bought at a month's credit, the purchaſer is entitled to inſiſt upon their being delivered in the ordinary courſe of trade; but contrary thereto, the goods are detained by the Plaintiff's procurement until the month is expired, and are directed to be then delivered only upon payment of the price. The broker is not entitled to his commiſſion unleſs he does his duty, which he violates by ſtopping the goods from coming to his employer's hands. If *Whitley*, of himſelf, without the aid of the Plaintiff, had ſtopped the cottons, the Plaintiff might have recovered; but, under the preſent circumſtances, if he were agent for both parties, yet if he forwarded the intereſts of the one, by ſacrificing thoſe of the other, he is not entitled to recover commiſſion againſt the latter. The ſame reaſon prevents his recovering the duty, for if he were entitled to recover it againſt the Defendant, he would receive it twice over; for he is already repaid the duties, inaſmuch as he has ſold the goods, increaſed in value by the amount of the duties paid, and has received the price, and therein the amount of the duties, from the laſt purchaſer. Even if the Defendant, and not the Plaintiff, had prevented the bargain being completed, the Plaintiff could not have recovered commiſſion, which is not due till the completion of the contract; though he might have maintained an action againſt the Defendant for preventing him, as broker, from completing a purchaſe upon which he would have been entitled to commiſſion.

Vaughan

Vaughan in support of his rule. The plaintiff pays the sums of 87*l.* 12*s.* for the duties, and 61*l.* for allowances to the *East India* Company on the 10th of *February*, upon the taking the goods from the *India-house*, in the due discharge of his duty, in pursuance of the instructions given him on the 7th. He was bound to pay these sums; for he could not otherwise get the cottons out of the warehouse. He was on that day therefore entitled to be repaid these sums; it was a vested right. On the 11th he delivered the goods at the *Axe*, which was a delivery to the Defendant, whence they are forwarded on the 18th; and although on the 27th the Plaintiff gives directions at the *Axe* that the goods shall not be forwarded, yet they were then out of the power of the carriers there, and the order was inoperative. No action could be maintained against the Plaintiff for misconduct; but if any could, yet that would not vacate his right to recover these debts already incurred; and as it is not the course of trade for brokers to charge interest on the sums they advance, his only compensation for these advances is in the shape of the commission, which is therefore due. It was not in proof that the goods were stopped in consequence of the imprudent order given on the 27th, and fraud is not to be inferred.

MANSFIELD C. J. I do not know that the Plaintiff is entitled even to the duties, though it may be a very hard case. For what is the case? The plaintiff buys cottons according to his instructions, and sends them, and by some accident they do not set out till the 18th. It is in evidence that they were stopped on the canal, the Plaintiff says, by the seller; but if so, the seller could have known where to stop them only by communication with the Plaintiff; when they arrive and are offered to the Defendant he will not take them, the price had then fallen. The

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Plaintiff writes on the 27th, the price of the goods not then being payable, to ſtop them, unleſs upon payment of the money. I have no note of any evidence that the Plaintiff had previouſly ſent to *Liverpool* other goods directed to his own order. On the 11th the Plaintiff pays voluntarily for the goods, not in conſequence of any direction from the Defendant. So long after as the 19th of *May*, the Plaintiff himſelf takes the goods and ſells them. If he did it out of honor to ſave the Defendant's credit, the utmoſt he could do would be, on paying *Whitley*, to be permitted to ſue the Defendant in *Whitley*'s name for the price of the goods. Inſtead of that he pays the money, and endeavours, in a ſhort way, to recover for money paid. Having himſelf taken poſſeſſion of the goods, what right has he to charge the commiſſion? As for the duties, he is paid them in the increaſed price of goods which he receives.

HEATH J. The difficulties under which the Plainiff labours, he has brought on himſelf by deſerting his duty as a broker.

LAWRENCE J. It was admitted by the Plaintiff's counſel, that if, through the miſconduct of the Plaintiff, the Defendant does not get the goods, the Defendant is not bound to pay for them. Now, as far as the evidence goes, it appears that the goods arrived on the 10th of *March*: that on the 11th the Plaintiff took to the goods, and afterwards ſold them. There is therefore every reaſon to believe that the non-delivery was occaſioned by the act of the broker himſelf.

CHAMBRE J. Certainly there was no delay in making the purchaſe; but the delivery at the *Axe* is not a delivery to the Defendant; becauſe the Plaintiff ſends them to be delivered to his own order, and before their arrival

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at *Liverpool* he ſends orders that they ſhall not be delivered to the Defendant till the time of credit is up: having then taken the goods, how can he poſſibly recover either for commiſſion or for the money paid in his own wrong for the goods?

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Rule diſcharged.

LYNCH and JONES *v.* HAMILTON.

June 28.

An inſurer is bound to communicate to the underwriters any intelligence he has, which may affect his choice whether he will inſure at all, and at what premium he will inſure.

Whether in fact true or falſe.

If a ſhip is advertiſed to be in danger, and the inſurer effects a policy on ſhip or ſhips, knowing that the ſhip in danger is one of them, without ſtating the ſhips names, this is a concealment which avoids the policy.

Although the rumour was falſe.

If an inſurer effects a policy on ſhip or ſhips, knowing their names, but not communicating them, *ſemble* that the policy is void; ſuch an inſurance being tantamount to a repreſentation that he does not know by what ſhips the goods will come.

THIS was an action brought upon two policies of inſurance effected by the Plaintiff *Jones*, who was an inſurance-broker, for himſelf and his partner the Plaintiff *Lynch*. The firſt policy bore date on the 17th of *September*, and the ſecond on the 26th of *November* 1808. The inſurance in both was "at and from all or any of the *Canary* iſlands to *London*, with leave to carry ſimulated papers, and the King's licence, upon any kind of goods or merchandizes on board the good ſhip or veſſel, ſay ſhip or ſhips," valued, and declared to be "on goods as intereſt might appear, at ten guineas *per cent*, to return three *per cent.* for licence or arrival." The Plaintiffs declared the inſurance to attach on goods laden on board the *Friendſhip*, *Anna Margaret*, and *Preſident*. The declaration averred that the Plaintiff was intereſted to the amount of all the money inſured; and further ſtated that the *Preſident* was captured on the 18th of *November*, and that an average loſs was ſuſtained upon the goods on board the *Friendſhip* by perils of the ſeas. The latter loſs was paid into court.

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Upon the trial of this cause at the *Guildhall* sittings after last *Hilary* term before *Mansfield* C. J., it appeared that the Plaintiff *Jones* had, in *August* 1808, effected a policy on goods by the *Anna Margaret*, by which ship he expected them to come; but in consequence of instructions from *Lynch*, who was then at *Teneriffe*, stating that the goods would be sent home in ship or ships, that policy was cancelled, and the policy of the 17th *September* was effected. *Lynch* shipped this adventure on board the *Friendship*, *President*, and *Anna Margaret*; and himself returned to *England* by the *Anna Margaret*, which sailed before the *President*. Finding, on his arrival, that the policies then effected fell short by 4000*l.* of the whole amount of his interest, he caused *Jones* to effect the policy of the 26th of *November*. The following paper was posted up in a conspicuous part of *Lloyd's* coffee-house on the 22d *November*, and continued there till the time of effecting the policy. "The *Howard*, "*Marsh* master, arrived off *Dover*, from *Teneriffe*. Off "the *Salvages*, on the 27th day of *October*, being one "day's sail from *Lancerotto*, she fell in with the *President*, *Owings* master: she observed the *President* near "on the larboard bow: she appeared labouring much, and "to be very leaky and deep laden." *Jones* at that time knew the *President* to be a ship on board of which part of the goods insured was laden, and had the bills of lading in his possession. He did not communicate to the underwriter this circumstance, nor the letter, which was posted up, and which he had seen: but the letter was notorious, and the Defendant had equal opportunities with himself of seeing it. *Owings*, the captain, being called, proved, that on the 18th of *November* his ship the *President* was captured by a *French* privateer at the back of the Isle of *Wight*, being then perfectly in good time: that on the 27th of *October*, when he saw the

Howard,

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Howard, *Marsh* master, the *President* was in good order, perfectly sea-worthy, and neither leaky nor deeply laden, and that he had no communication whatever with the *Howard*. *Shepherd* Serjt., for the Defendant, contended that the Plaintiff could not recover upon this second policy, for that he ought to have communicated to the underwriter both this paper and the fact that the *President* was covered by the policy; and urged that the concealment of either of these circumstances would avoid the contract. One of the jury raised the question whether a policy could legally be effected on ship or ships, without naming them, if they were then known to the insurer; to which his Lordship answered, that it had never yet been decided that a policy was void on that ground alone: but he left it to the jury whether the intelligence contained in the letter was not material to be communicated to the underwriter; and whether that communication had been made. The jury found a verdict for the Defendant.

Vaughan Serjt. in *Easter* term obtained a rule *nisi* to set aside this verdict and to enter a verdict for the Plaintiff, or have a new trial. [*Mansfield* C. J., upon the motion for the rule, observed that there was no evidence or suspicion of actual fraud in this case: but the jury were of opinion that if a man knew by what ships his goods were coming, it was fraudulent to insure on ship or ships; and the reason is obvious, for if the *President* had arrived safe, and another ship had been lost, the Plaintiff would have applied his policy on ship or ships to the vessel lost. *Lawrence* J. thought it worthy of consideration whether, when a person insures on ship or ships, it is not equivalent to a representation that he does not know the ships, and if he does know them, whether it may be deemed to amount to a misrepresentation; for if the

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underwriter were not thus misled, he would inquire the state and condition of the ships.]

Shepherd and *Lens*, Serjts., in shewing cause against the rule, observed that, although it had never yet been decided that an insurer, knowing the name of the ship by which his goods are coming, is bound to communicate it at the time of insuring, yet since the words of this policy indicate a studious concealment of the name of the ship when the plaintiff had the power to disclose it, that was in effect a misrepresentation, for it was equivalent to an assertion that the plaintiff did not know by what ship or ships the goods would come; and under these circumstances it might be right to say, that the Plaintiff could not insure on ship or ships: but the jury did not proceed merely on the ground of this abstract notion which they had conceived of the law, but, after their attention was called by his Lordship to the particular application of the law to the present case, they decided on the ground that an insurer is bound to inform the underwriters of all that he knows which can be deemed material to the subject insured; and in this case the Plaintiff possessed the intelligence that his ship was deep and leaky, yet he does not communicate it. The objection is not, in form, that he did not disclose that the *President* was deep and leaky, for the sources of that information were equally open to both parties, but that he, having seen the statement of the condition of the *President*, did not communicate to the underwriter that the *President* was one of the ships to be insured. If the insurance had been effected on the *President* by name, and the plaintiff had been informed that she was deep and leaky, it is quite clear that he ought not to have insured without disclosing that information; the not disclosing what ship the Plaintiff meant to insure, is precisely the same thing in its consequences as if he had

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ſpecifically inſured the ſhip *Preſident*, and had concealed what he knew of her condition: and it is immaterial whether the information be true or falſe. *Decoſta* v. *Scandrett*, 2 *P. Wms.* 170., where one having a doubtful account that a ſhip deſcribed like his was taken, inſured her without informing the underwriters, Lord *Macclesfield*, Chancellor, held, that he ought to have diſcloſed to them what intelligence he had of the ſhip's being in danger, and which might induce him, at leaſt, to fear, that it was loſt, though he had no certain account of it; for if this had been diſcovered, it is impoſſible to think that the inſurers would have inſured the ſhip at ſo ſmall a *præmium* as they had done, but either would not have inſured at all, or would have inſiſted on a larger *præmium*, ſo that the concealing of this intelligence was a fraud. Yet that intelligence was doubtful. 2 *Str.* 1183. *Seaman* v. *Fonnereau*, at *Guildhall*: the Plaintiff's agent received a letter to this effect: "On the 12th of this "month I was in company with the ſhip *Davy*; at 12 "in the night loſt ſight of her all at once: the captain "ſpoke to me the day before, that he was leaky; and "the next day we had a hard gale." This letter was not communicated to the underwriter; and although the ſhip continued her voyage till the 19th, and was then captured, *Lee* C. J. held, that the agent ought to have diſcloſed the letter, for either the defendant would not have underwritten, or would have inſiſted on a higher premium. And each party ought to know all the circumſtances. In the caſe of *Willes* v. *Glover*, 1 *New Rep.* 14., the contents of a letter which ſtated the probable time of the ſhip's ſailing, were withheld from the underwriters, and although that expectation was not correct, as the ſhip did not ſail for a fortnight afterwards, yet the withholding the intelligence was deemed to vitiate the policy. In a late caſe of *Beckwaite* v. *Nalgrove*, tried at *Guildhall*, the Plaintiff had concealed from the

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the underwriters the fact that he had received a letter from the *Cape of Good Hope*, stating that there then were two or three *French* privateers in those seas; and upon the ground of that concealment he was nonsuited, and never moved for a new trial.

Vaughan and *Pell*, Serjts., *contrà*. There are two questions in this case; first, whether the Plaintiff is absolutely bound to disclose the name of the ship if he happens to know it when he effects the policy; and secondly, whether he is bound to disclose every idle rumour that comes to his ear. The jury did not proceed on the ground that the communication of this letter was material; for when the Plaintiff's counsel would have argued that in his reply, they stopped him; and they decided wholly on the ground that the Plaintiff, who knew the names of the vessels, had insured on ship or ships without disclosing them. There is nothing in the terms of the second policy which indicates fraud, as it has been supposed; it only follows the phrase of the former policies, which were effected "on the good ship, say ship or ships," long before this letter was received. It was impossible that in this case the concealment of the names could be made an instrument of fraud, for all the former policies had been effected on ship or ships, and this was only an enlargement of the same risk, and on whatsoever ship the loss might have happened, all the underwriters on all the policies must have contributed to bear it. To insure the residue of the interest in the same terms after one ship was arrived, was rather a proof of good faith. The produce was not shipped on board the *President* only, nor does the policy apply to that ship alone, but equally to the *Anna Margaret* and *Friendship*, one of which arrived safe, and the other sustained only a trifling average loss. The case might be different if there were any pretence to say, that the concealment of the name of the ship was fraudulent;

 but

but that fact has not been found by the jury, nor was it even suggested at the trial. It is natural to suppose that, when an underwriter subscribes a policy on ship or ships, since the net is spread so wide as to include the risk upon every vessel wherein any of the goods can possibly be laden, he will require a higher premium than when it is confined to the mischances that may befal a single vessel: and since the increase of premium compensates him for the more extended risk, it is unnecessary to give him the advantages which reasonably enough attend an insurance effected at a lower premium. As to the second point, the underwriter may prudently abstain from communicating any rumours he may hear, for the very reason that has been assigned as obligatory on him to disclose them, because the disclosure would increase his premium. It may be admitted that, by the concealment, he takes the additional risk on himself; if the reports are true, the insurance is gone, but if they are false, the insurance stands unaffected. In two of the cases which have been cited, there were not mere rumours, but facts had actually happened which were never disclosed. It is to be collected from the case of *Decosta* v. *Scandrett*, that the ship was really captured, as it was reported, and it being captured, the Plaintiff, who had taken on him this risk, lost his insurance. In the case of *Seaman* v. *Fonnereau*, it may fairly be inferred that the ship was in the state described, from the language of the report, which adds, "the ship, however, continued her voyage till the 19th." This case, too, is very distinguishable from that of *Willes* v. *Glover*, for there the plaintiff accompanied his order to make the insurance with directions to conceal the expected time of sailing. In all the decided cases the intelligence to be communicated has been addressed to the Plaintiff or his agent, and might and ought to have been disclosed by them. Here the letter was not addressed to the Plaintiff

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or his agent; some enemy might have put it up for purposes injurious to the Plaintiff; and at the trial it was proved that the rumour was unfounded. If every rumour is to be noticed, underwriters might obtain great advantages by themselves posting up notices that ships were in danger. Both instances of concealment, therefore, were perfectly innocent. [*Mansfield* C. J. It certainly does not appear in what light the jury considered the concealment of the name of the ship: they may have considered it in two views; first, as a wilful and fraudulent concealment; secondly, as an instance of the bad consequences of insuring on ship or ships, when the ship's name was known.]

Cur. adv. vult.

Mansfield C. J. now delivered the opinion of the Court.

After having recapitulated the facts of the cases, he observed that, no doubt, upon established principles, a person insuring is bound to communicate every intelligence he has, that may affect the mind of the underwriter in either of these two ways; first, as to the point whether he will insure at all; and secondly, as to the point at what premium he will insure. Is this paper then a piece of intelligence of that description? It states that the *President* had been seen near the beginning of her voyage, deeply laden and leaky. In this case, the insurance being made on ship or ships, this paper would convey to all those who knew that the goods were on board the *President*, the intelligence, that the vessel which was bringing the goods was deeply laden and leaky, but it could not convey that idea to those who knew not where the goods were: this paper, therefore, could not convey to the underwriters any knowledge that the ship insured was deeply laden and leaky; but it did to *Jones*, for he knew on board what ship the goods

were

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were laden. This made the difference in the ſtate of their information; and the withholding of the ſhip's names, kept the underwriters completely in the dark, as to any notice that the ſhip inſured was deep and leaky. The queſtion therefore is, whether the Plaintiff, effecting an inſurance under this diſparity of condition, is entitled to recover. I cannot diſtinguiſh this from the caſe of *Seaman* v. *Fonnereau*, where a letter received, ſtated that the veſſel inſured had been ſeen in the night leaky, and had diſappeared the next day; and though that rumour was falſe, inaſmuch as the ſhip kept her courſe, and was afterwards captured, it was held that, for want of that diſcloſure, the underwriters were not liable. We do not now decide on the point, that a party cannot inſure on ſhips or ſhips when he knows on board what ſhip his goods are laden, although the jury thought that was a proper ground for a nonſuit, but we decide on the ground of the adjudged caſes, applied to the circumſtances of the preſent action, namely, that the Plaintiff did not communicate this rumour, ſo prejudicial to the ſafety of the veſſel, when he himſelf knew it, at the ſame time underſtanding, as we do, that the rumour was groundleſs.

Rule diſcharged.

HILL *v.* TOWNSEND.

June 28.

If an award is loſt, the Court will, neverthelefs, permit judgment to be entered accordingly, upon affidavit of its contents.

SHEPHERD Serjt. moved for a rule that the Plaintiff in this action, which, upon the trial at *Coventry*, had been referred by an order of *niſi prius*, might enter up judgment purſuant to the award, upon an affidavit that the arbitrator had made ſuch an award, and had ſent it the Plaintiff's attorney, who was now dead, and that the award was not to be found among his papers or elſe-

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elsewhere. The original draft of the award was annexed to the affidavit.

The Court granted a rule *nisi*; and no cause being shewn, it was afterwards made

Absolute.

June 28.

CLARKE *v.* HOPPE and WONTNER, Bail of WILSON.

If an action be commenced, and the Defendant become bankrupt and obtain his certificate, and afterwards permit judgment to be signed for want of a plea, after which the Plaintiffs proceed against the bail, the Court will not relieve the bail on motion. And *semble*, that they could in no mode take advantage of the bankruptcy and certificate.

BEST Serjt. had on a former day obtained a rule *nisi* for setting aside the proceedings in this action against the bail, under the following circumstances. The Defendants became bail for *Wilson* in the original action, in *Michaelmas* term 1808; a commission of bankrupt issued against *Wilson* on the 26th of *November* 1808: the bankrupt obtained his certificate on the 20th of *January* 1809, not having then pleaded. The Plaintiff had applied to the commissioners to be permitted to prove his debt under the commission, but they would not allow him: however, they allowed him to enter his claim under the commission, and recommended to him to proceed in his action. In *June* 1809, the Plaintiff signed an interlocutory judgment for want of a plea, and had since executed a writ of inquiry, signed final judgment, sued out writs of execution, and proceeded regularly against the bail.

Vaughan Serjt. on a former day in this term shewed cause. *Wilson* might have availed himself, in the original action, of his bankruptcy and certificate by pleading it; but having neglected so to do, and having permitted all the costs of the subsequent proceedings to be incurred, he has lost his opportunity, and the bail cannot

be

be in a better condition than their principal. If the bail could at this moment surrender their principal, he would not be entitled to his discharge, for his relief is only under the act of 5 *Geo.* 2. *c.* 30. *s.* 13. which enacts that, "if any bankrupt, who shall have obtained his "certificate, and such certificate shall have been allowed "and confirmed as by that act is directed, shall be taken "in execution, or detained in prison, on account of any "debt owing before he became a bankrupt, by reason "that judgment was obtained before such certificate was "allowed and confirmed," the Court may order him to be discharged: but if the principal in this case were surrendered, he would not be taken or detained, "by "reason that judgment was obtained before his certifi-"cate was allowed," for he had his certificate long before judgment, and before plea pleaded, and might have pleaded it; and these circumstances arising long before the late statute 49 *Geo.* 3. *c.* 121. was passed, it is unnecessary to consider whether the case could be affected by any of the enactments therein contained.

Best in support of his rule. The bail are entitled to relief in this case. The objection to this is a surprize; for it was considered as of course that the bail would be discharged. *Beddome* v. *Holbrook*, 1 *Bos.* & *Pull.* 450. *n.* Where, in *scire facias* against the bail, they pleaded generally that their principal, after judgment recovered, and before the *scire facias* issued, became a bankrupt and obtained his certificate, which was allowed before the return of the *scire facias*; though the Court, on demurrer, held that the general plea was given only to the bankrupt himself, and even doubted whether the bail could in any way plead the bankruptcy and certificate; yet *Buller* J. said, that might afford ground for the Court to relieve on motion. 1 *Bos.* & *Pull.* 150., *Donelly* v. *Dunn.* But as the bail here were not fixed before the certificate

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certificate obtained, they cannot be fixed after it. The bail in the present case had no notice that the action was proceeding; neither ought they to be precluded of their relief by the laches of the Defendant, who might have pleaded his certificate.

MANSFIELD C. J. In every case the bail put themselves in the hazard of suffering by the folly and negligence of the Defendant; and although the common rule is that if the bail is not fixed before certificate obtained, they are discharged: yet here there has been a neglect to plead the certificate.

HEATH J. It is the business of the bail to watch the proceedings.

LAWRENCE J. If the bail will search the files of the Court they will find a writ of *capias ad satisfaciendum* returned *nihil*, which is notice to them that the Plaintiff intends to proceed against them. And are not the bail in all cases bound and benefited by the defence of their principal? Is it not their business to watch him?

The Court directed that the case should stand over, in order that the parties might search for precedents in similar cases.

On this day the matter was again moved. The counsel produced no precedents: but *Best* said it was an application to the equitable jurisdiction of the Court.

MANSFIELD C: J. We will let in the bail to try the right in the original action, in an issue; the Defendants undertaking not to set up the bankruptcy and certificate as a bar; and the bail-piece in the mean time to stand as a se-

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a security; the consideration of costs to be reserved till after the trial of the issue; and the rule in the mean time to stand enlarged.

LAWRENCE J. said that he had made enquiries of Master *Foster*, and that the case had not been known to occur in the Court of *King's Bench*: that in the issue the bail were to be Defendants, and the Plaintiff here was to be Plaintiff in the issue, and was to aver that so much money was due and owing; and the bankrupt was not to be examined as a witness.

CHAMBRE J. This is a very nice question, and it is the first time it ever came before the Court: we cannot therefore give costs now. They must stand over for further consideration.

Rule enlarged.

NOKES, Plaintiff; STYLES, Widow, Deforceant.

June 29.

All fines acknowledged in *Westminster* must be acknowledged before a judge or a serjeant, if there is a judge in town.

And if it be acknowledged before any other commissioners, it is irregular, whether it appear by the caption that it was acknowledged in *Westminster*, or not.

LENS Serjt. moved that the acknowledgment of a fine might be amended by striking out the place mentioned in the caption. It was expressed to be, and was in fact taken and acknowledged at the house of *J. Perrott*, commonly known by the name of *Perrott's Hotel*, in *Brook-street*, in the parish of *St. George*, *Hanover-square*, in the county of *Middlesex*, on the 7th of *June* 1810, before two ordinary commissioners therein named: the premises were in the county of *Salop*. The conusor was of the age of 83 years, and had since returned into the county of *Salop*, and there was some apprehension, from the state of her health, and her advanced period of life, that it might not be practicable to procure another acknowledgment by her in that county. It was pointed out

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out by the judge's clerk as an irregularity, that the conusor being in *Westminster*, it was necessary that she should personally appear before a judge to acknowledge it. *Lens* contended that if the defect ceased to appear on the caption, there would be no objection to the fine; for the state of the conusor's health was such, that if she were still in *Westminster* she could not appear before a judge, either in court or at chambers; and moreover, the rule of Court requiring personal appearance generally was understood by practioners to relate only to fines levied in term time, not in the vacation: and upon enquiry among practitioners, it appeared that, in point of fact, it was usual to take the acknowledgments of fines by *dedimus* as well in *Westminster* as in the country: and as well when there are judges in town as when there are none. The clause *quia ægrotat* was in use as well in the case of the conusor residing in *Westminster*, but not being well enough to come down to *Westminster-hall*, as of one residing at a distance.

The Court adjourned the decision of the point to this day, when they were clear that the amendment could not be permitted; and that if it were, the fine would still continue irregular. As to the supposed practice, if an acknowledgment is taken before the chief justice, no *dedimus* is necessary; if the acknowledgment is taken before a puisne judge, or a serjeant, a *dedimus* directed to them is necessary: but the difference is, that while a judge is in town no *dedimus* can be directed to any other commissioners; and that if the acknowledgment be taken before a judge or a serjeant, a *dedimus* to authorize it may issue afterwards; but in the case of all other commissioners the *dedimus* must issue before the acknowledgment taken. The fine was irregularly taken in the first instance, being in direct contradiction to a standing rule of the Court, and

and the parties sought to cure it by requesting the Court to sanction a fraud on their own rule.

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Lens took nothing by his motion.

[IN THE EXCHEQUER-CHAMBER.]

SAXELBY v. MOOR.

June 29.

Upon a writ of error being non-prossed, if the cause of action in the court below was not a debt which carried interest, the Court of error will not allow interest on the sum recovered by the judgment, unless it is distinctly proved, or admitted, that the writ of error was brought for delay.

Although there are strong circumstances from which it may be inferred that it was brought for delay only.

TINDAL moved that the clerk of the errors might compute the interest on the sum recovered by the judgment affirmed in this case: the action in the court below was for goods sold and delivered, but his affidavit stated a letter, written by the Plaintiff in error, soon after the trial, in which he admitted that "he conceived that the accounts between the Plaintiff and Defendant were finally closed by the verdict of the jury;" whence the Court could infer that the writ of error was brought only for delay. *Miller* v. *Cousins*, 2 *Bos. & Pull.* 329. The Court seeing it was in effect, though not expressly admitted by the attorney for the Plaintiff in error, that delay was the object of the writ, refused to stay execution pending a writ of error brought; and the practice of the King's Bench is the same. *Law* v. *Smith*, 4 *T. R.* 436. *n.* And wherever the Courts below would refuse to stay executions, this Court, on affirmance, will give interest.

MANSFIELD C. J. Certainly the law is rather in an odd state in this respect. The Courts will not stay an execution where there is positive evidence of the purpose

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of delay: but where there is no evidence of it, though every one knows the writ is sued out for delay, it is a stay of execution. The interest in this Court must probably follow the rule of executions in the Courts below; but the facts stated by the Defendant in error are not sufficiently strong to prove that the writ is brought for delay only. It is true that the verdict of a jury settles the account; but it does not therefore necessarily follow that the error is not brought for good cause.

Rule refused.

June 29.

ELLIS v. HAMLEN.

If a builder undertakes a work of specified dimensions and materials, and deviates from the specification, he cannot recover upon a *quantum valebant*, for the work, labour, and materials.

THIS was an action brought by a builder against his employer, upon a special contract for building a house of materials and dimensions specified in the contract, to recover the balance of the sum therein agreed on; the principal part of the price having been paid. Upon the trial of this cause this day at the sittings at *Guildhall*, before *Mansfield* C. J., the defence was, and the evidence supported it, that the Plaintiff had omitted to put into the building certain joists and other materials of the given description and measure. The counsel for the Plaintiff proceeded to enquire of the witnesses what additional sum must be expended on the house to make it equal in value to that which was specified in the contract, contending that the Plaintiff was entitled to recover in this action the whole sum which was specified in the contract, excepting thereout the amount of this difference in value, which, they said, would be the measure of damages, if an action had been brought on the contract by the employer against the builder for not performing his contract; and that if the sums which had already been paid to the Plaintiff on account did not amount

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amount to the whole price specified in the contract, deducting therefrom the amount of the before-mentioned difference in value, the Plaintiff was entitled to a verdict for the residue, *minus* that difference.

MANSFIELD C. J. was of opinion that the Plaintiff, not having performed the agreement he had proved, must be nonsuited.

The Plaintiff's counsel then resorted to a count which they found in the declaration, for work, labour, and materials, upon a *quantum valebant*, and said, that the Plaintiff having the benefit of the houses, was bound at least to pay for them according to their value. *Mansfield* C. J. Suppose you had come hither upon a *quantum valebant* only, could you have recovered on it? Certainly not. The Defendant would have said, "I made no such agreement: I agreed to pay you if you would build my house in a certain manner, which you have not done:" Here the Plaintiff has properly declared on his special contract, and he has shewn and proved that he made such a contract, and has received much money on it. He cannot now be permitted to turn round and say, I will be paid by a measure-and-value price. The Defendant agrees to have a building of such and such dimensions: is he to have his ground covered with buildings of no use, which he would be glad to see removed, and is he to be forced to pay for them besides? It is said he has the benefit of the houses, and therefore the Plaintiff is entitled to recover on a *quantum valebant*. To be sure it is hard that he should build houses and not be paid for them; but the difficulty is to know where to draw the line; for if the Defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for any thing, how far soever distant from what the contract stipulated for. The Plaintiff accordingly was nonsuited; and the case was never again moved.

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June 10.

Doe, on the Demise of Godsell, v. Inglis.

A notice desiring the Defendant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession.

THIS ejectment, brought to recover the possession of a messuage in *West Cowes*, upon three demises, the first of which was laid on the 27th of *December* 1805, and the second on the 31st *August* 1809, was tried at the *Winchester Lent* assizes 1810, before *Chambre* J., when a verdict was found for the Plaintiff, subject to a case in substance as follows: *Godsell* being seized in fee of the premises, on the 8th day of *January* 1809, by indenture demised them to the Defendant for seven years from the 21st of *December* then last past, at the yearly rent of 26*l.* 5*s.*, and died seised in *March* 1802, having first, by will duly executed to pass real estates, devised them to his son *John Godsell*, (the lessor of the Plaintiff,) in fee: also the rents and profits arising therefrom, to be received by his executors until his son should be of age, and to be applied by them for his son's maintenance and advancement in life, as to his executors should seem meet; and the residue, if any should remain in their hands at the time of his arriving at the age of 21 years, to be paid to him for his own use and benefit: and he appointed the Defendant and three others his executors. The Defendant had continued in possession of the premises from the commencement of the term of seven years hitherto. The Defendant, after the death of the lessor, paid the rent reserved by the lease to one of his co-executors *Thomas Godsell*, during the continuance of the lease; and from the expiration of the lease to the 21st of *December* 1808, likewise paid him rent after the same rate. The lessor of the Plaintiff attained the age of 21 on the 13th of *August* 1809; and on the 2d day of *November* in the same year gave to the Defendant "notice to quit the house, store-house, and quay he held under the lessor of

the

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the Plaintiff, situate at *West Cowes*, in the *Isle of Wight*, the Defendant's term therein having some time since expired." No other notice to quit had been given. The question for the opinion of the Court was, whether the lessor of the Plaintiff were entitled to recover.

Lens Serjt., for the lessor of the Plaintiff, was stopped by the Court; who called on

Shepherd Serjt. He contended that by the notice which had been given, the lessor of the Plaintiff, by using the expression "the premises which you hold under me," distinctly recognized a tenancy of the Defendant, as holding under the lessor of the Plaintiff after the time when the old lease had expired in 1805, and after the time when the interest of the executors had expired. It was in proof that the tenancy first originated from 21st *December*; and therefore every subsequent year after the expiration of the lease must be computed from 21st *December*. A notice therefore given on 2d *November*, must be understood as a notice requiring the Defendant to quit on 21st *December* then next ensuing, which was too short a notice for quitting on that day, and unreasonable; and it could not be understood as a notice requiring him to quit at the end of the ensuing year. It was therefore bad as a notice, but good as a demise, or rather as the recognition of a subsisting tenancy, which could not be determined without notice, and no subsequent notice had been given.

MANSFIELD C. J. You do not shew that the holding subsequent to the expiration of the lease was with the assent of the lessor of the Plaintiff. There is nothing at all in the case. This writing is not in the least like a notice to quit, but is a mere demand of possession, the Defendant's term having then some time since expired.

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The lessor of the Plaintiff need not have given any notice at all; but the circumstance of his having given a notice, will not hurt him. The Plaintiff is entitled to judgment on the second demise.

June 30.

WATERS *v.* Sir WM. MANSELL, Bart.

To entitle the grantee of an annuity to recover back the price, as money had and received, it is sufficient if the grantor has communicated to the grantee that there are defects in the memorial, and has treated for a compromise on the ground of the annuity being void, although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old ones, before he sues.

And although the grantor has taken no active measures to set aside the securities.

THIS was an action for money had and received, brought to recover back the price which the Plaintiff had paid for a life annuity, it having been discovered that on account of an informality in the memorial, which omitted to state as part of the consideration, that the life of the *cestui que vie* was to be insured at the expence of the grantor, the securities were void. The Defendant pleaded the general issue, and the statute of limitations. Upon the trial of this cause at the sittings at *Westminster* in this term, before *Mansfield* C. J., it appeared that when six half-yearly payments of the annuity had been made, the Defendant, becoming embarrassed in his circumstances, went abroad, and after that time he never made any further payments of the annuity. In his absence, his mother, Lady *Mansell*, within six years before the commencement of this action, by the agency of her solicitor, sent a circular letter to all her son's annuity creditors, and amongst others to the Plaintiff, apprizing them that she was informed that all the annuities could be set aside for want of form, but that she was willing to compromise with all of them, if all would accede to the measure, and to repay them their principal and interest, they giving credit for the several annuity payments which they had received; but, that unless all accepted the proposal, it would not be granted to a part of them only, and they would receive nothing. When the Defendant

returned to *England* he assented to what Lady *Mansell* had done; but all the annuitants not acceding to the terms proposed, the negotiation dropped. Lady *Mansell's* solicitor being examined, stated, that he never knew of the specific defects in this annuity: the Plaintiff's solicitor, on the other hand, gave evidence that he did know of the specific defects, and believed that the other witness knew them. *Lens* Serjt., for the Plaintiff, relied on this evidence as proving that, within six years past, the Defendant had acknowledged the debt, by admitting the annuity deeds to be void. *Best* Serjt. and *Casberd*, for the Defendant, objected, that the money was originally paid as the consideration for the purchase of an annuity, and nothing was proved by which it appeared that the annuity did not still subsist: for although it was alleged that there was some defect in the memorial, the specific defect was not stated to the Plaintiff, and nothing was in fact done in consequence of the objection. If the Defendant had applied to this Court, and had procured the annuity to be set aside for these defects, the Plaintiff might well have recovered the price; but Lord *Kenyon* C. J. held, that it was necessary the grantor should dissent to the annuity, and that unless the annuitant has communicated the defect to the grantor, and requested new securities, and until the grantor has refused to execute them, the annuity must be deemed to subsist; or at least it does not lie in the mouth of the annuitant, by whose own laches it happens that the securities are imperfect, to say, that it is at an end. *Weddell* v. *Lyneham*, 1 *Esp. N.P. Rep.* 309. *Hicks* v. *Hicks*, 3 *East*, 16. Where the Court held the defendant entitled to set off all the annuity-payments that had been made before the annuity was set aside, it expressly appeared that new securities had been tendered by the grantee to the grantor for execution,

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tion, and that the latter had refused to execute them. At least the Plaintiff ought to have given up the annuity deeds to be cancelled; for before he could sustain this action, he was bound to put himself into such a situation, that he could never again turn upon the Defendant, and, by insisting on the annuity, render it necessary for him to move to set aside the securities.

MANSFIELD C. J. Lord *Kenyon's* opinion is clearly law so far as this, that the Plaintiff cannot, by his own negligence, alter the contract from a contract of annuity to a contract of money had and received: but after this negotiation, and it being understood between the two solicitors that the securities are void, the question is, whether, upon the compromise not going on, it was necessary for the Plaintiff to demand payment of the arrears of the annuity, or to tender new deeds before he could bring this action: he was not bound to send back the old deeds, for they are part of his evidence to make out his case when he comes to bring his action for money had and received. The evidence being contradictory as to the solicitor's knowledge of the defects, his Lordship left it to the jury to find, whether the Defendant had dissented from the annuity or not, and, considering this as a new point, directed the jury, if they should be of opinion that the Defendant had dissented, they should find a verdict for the Plaintiff; and gave liberty to the Defendant to move to enter a nonsuit, if the Court should be of opinion that it was necessary to this action that any thing more should take place between the parties, than that both of them should understand that the securities were void. The jury accordingly found a verdict for the Plaintiff for the damages in the declaration, subject to an account to be taken by an arbitrator, and subject to the point reserved.

Best on this day moved to enter a nonſuit, upon the ſame grounds, which he had taken at the trial, and particularly inſiſted on the point, that the Plaintiff ought to have given up the deeds; for that by lying by, he might, in many caſes, change the Defendant's ſituation, whoſe witneſſes might die, ſo that if the Plaintiff ſhould again chooſe to ſet up the annuity, the Defendant might be unable to diſprove it. 1810. WATERS v. MANSELL.

The Court were unanimous in refuſing the application: it was a ſtrange argument: the Defendant firſt pays ſix half-yearly payments, then becomes embarraſſed, and ceaſes to pay; he then treats for the redemption of the annuity, and on that treaty both parties agree that the annuity is void, and no payment thereof is ever afterwards made.

Rule refuſed.

RAWLINGS, Demandant; PRICE, Tenant, JOHN TOM and MARY his Wife, and WILLIAM TOM and MARY his Wife, firſt Vouchees; JOHN TOM the Younger, ſecond Vouchee. *June* 30.

A recovery may be amended by ſtriking out the voucher of a vouchee, whoſe acknowledgment was taken without a *dedimus*.

THIS recovery was intended to have been of *Eaſter* term laſt paſt, and with treble voucher, the vouchees appearing by attorney, and the tenant appearing in perſon. By a miſtake, however, only one *dedimus* was obtained, and ſent into the country; but the acknowledgements of both the firſt and ſecond vouchees were taken, the latter of which was therefore irregular; and after the writ of entry had iſſued, and the tenant had appeared at bar, the curſitor, diſcovering the miſtake, refuſed to make out the *mittimus* and tranſcript, upon the ground that there ought to have been a ſecond *dedimus* for the ſecond

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ſecond vouchee. It being of little importance whether the ſecond vouchee were or were not vouched, in order to avoid the expence of ſuffering another recovery *de novo*, *Lens* Scrjt. moved to amend the writs of *dedimus* and entry, and the warrant of attorney, duplicate and *præcipe* at bar, by ſtriking out the name and the warrant of attorney of *John Tom* the younger, and every thing elſe that related to him; ſo that the recovery might become a recovery with double voucher only, and might paſs as of the laſt *Eaſter* term.

The Court permitted the amendment.

July 2.

PEARCE *v.* HOOPER and Others.

If a Defendant calls on a Plaintiff to produce at the trial a deed in his cuſtody, to which the Plaintiff is a party, and under which he claims a beneficial eſtate, it is not neceſſary that the Defendant ſhould call the atteſting witneſs to prove the due execution of the deed when produced.

TRESPASS for breaking and entering the Plaintiff's cloſe, called *Coldrinick* Wood, and cutting down the coppice and underwood there growing, and ſeizing, taking, and carrying away the ſame. The Defendant pleaded not guilty. Upon the trial of this cauſe at *Launceſton*, at the laſt *Spring* aſſizes for the county of *Cornwall*, before *Graham* B., it appeared, that by a leaſe bearing date the 9th day of *March* 1766, Sir *Chriſtopher Treiſe* granted to *Thomas Pearce*, for a term of 99 years, determinable on 3 lives, all that meſſuage and tenement, with the appurtenances, called *Coldrinick*, then in the occupation of *Thomas Pearce*, excepting thereout all timber trees and ſaplings, with liberty for the leſſor to enter and cut them. The leſſee was dead: and the Plaintiff was his ſon, and had for ſome years been in poſſeſſion of the premiſes demiſed by the leaſe, as executor to his father. The place in queſtion was a wood, containing about 15 acres, adjoining

joining to *Coldrinick* tenement, and called *Coldrinick* wood, which the Plaintiff now claimed as part of the estate of *Coldrinick*. At a public auction, for selling in lots several estates of the proprietor of these premises, held on the 21st of *November* 1808, the thirty-second lot exposed to sale was described to be the fee simple of *Coldrinick* estate, then in the possession of the Plaintiff, and containing 45 acres. The Plaintiff was present in person, and was the highest bidder for this lot, and was declared the purchaser. The thirty-third lot, which was next put up to sale, was described in the particular to be the fee-simple of *Coldrinick* wood, in hand, containing 15 acres, with the underwood and timber thereon, and immediate possession thereof to be given. The Plaintiff, by his agent, bid for this lot also. He did not, at the time of the sale, claim the property of it to be his own; nor did he object to the sale. This lot was bought in; but the Defendant, *Hooper*, afterwards became the purchaser, by private contract; and at a subsequent time, with his servants, entered thereon, and cut and carried away a part of the underwood and alders, being of such a description, that, if the place in which, &c. were demised by the lease of 1764, the wood taken was not reserved to the lessor under the exception therein contained. The Plaintiff gave some evidence of his having for several years having had the occupation of the wood, by depasturing his cattle therein, making the hedges and fences thereof, and thinning out the underwood, and taking it for his own use. The Defendant proposed to shew, not only that this wood was not comprehended in the Plaintiff's purchase of *Coldrinick* estate, but that since his purchase was commensurate with the premises demised by his lease; his taking a conveyance which excluded the wood, was evidence against him that he knew that the wood had never been demised to him by the lease; and with this intent the Defendant gave notice to the Plaintiff to

produce

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produce, upon the trial, the indenture of leafe and releafe, wherein the vendor had conveyed to him *Coldrinick* eftate, by a defcription limited to a fpecific number of acres; which would neceffarily exclude *Coldrinick* wood. The Plaintiff accordingly produced thefe deeds; but the Defendant not being prepared with the attefting witneffes to prove the execution of them, it was contended on the part of the Plaintiff, that without fuch proof they could not be received in evidence. On the other hand, the Defendant contended, that fince thefe inftruments came out of the hands of the Plaintiff, under a notice to produce them, and contained his title to the premifes, (if he had any title,) it muft be confidered that further proof of the execution of them was unneceffary. *Graham* B. was inclined to receive the evidence, but, upon the authorities cited, rejected it, referving the point; by the production of the original deeds the Defendant was incapacitated from giving in evidence a copy of it, with which he was prepared; and the jury found a verdict for the Plaintiff.

Lens Serjt., in laft *Eafter* term, moved for a rule *nifi* to fet afide the verdict; and to have a new trial on account of the rejection of this evidence: he admitted that in a recent *nifi prius* cafe, *Wetherfton* v. *Edgington*, 2 *Campb.* 94., the rule in *Gordon* v. *Secretan*, 8 *T. R.* 548., had been adhered to; but he obferved that if the Plaintiff had brought an action directly upon this inftrument, the Court would have enabled him to prove the execution of it, by compelling the Defendant, under a rule of the Court, to produce it for infpection. *Blakey* v. *Porter*, *ante* 1. 386. Perhaps, where the Plaintiff claimed only indirectly through the medium of that inftrument, the Court might not think fit to exert that interference; but it was neverthelefs reafonable that the Plaintiff fhould not be precluded from proving his cafe, becaufe the Defendant

fendant might think fit to withhold from him the knowledge of the names of the attesting witnesses. It was of the greatest importance that this point should be settled. The Court granted a rule *nisi*.

Best Serjt., in shewing cause against the rule, first contended, that as the Plaintiff had, under the lease of 1764, a title to the underwood at least, whether the fee-simple of the soil had been since conveyed to him or not, the Court ought not to send this to a new trial; because if they did, upon the lease, the Plaintiff must necessarily obtain a second verdict similar to the first. But the Court held that they could not say that the effect of this evidence, if admitted, might not very materially alter the case; and that the question therefore was, whether a deed coming out of a man's hands, to which he himself is party, is admissible in evidence against himself, without any proof of attestation? Upon which *Best* argued, that it was incumbent on the party calling for the deeds to prove the execution of them. The point had been decided in *Gordon* v. *Secretan*, 8 *T. R.* 548., where a declaration on a policy averred the Plaintiffs to be interested to the amount of the insurance; and the Defendant, meaning to dispute that fact at the trial, gave them notice to produce certain articles of agreement between them, (who were also owners of the ship,) and the captain, whereby, as he contended, it would appear that the captain, who was not a Plaintiff, was interested in one-third of the neat profits of the cargo, and that consequently the Defendant, who had paid into court more than the amount of the other two-thirds, was entitled to a verdict. The Plaintiff produced the instrument, attested by two witnesses, and insisted that the Defendant must call one of them to prove the execution: against this, the case of *The King* v. *Middlezoy*, 2 *T. R.* 41., was strongly urged, but Lord *Ellenborough* C. J. said,

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that that case had been since over-ruled; and that the notice given to the opposite party for the production of an instrument at trial, did not relieve the party calling for it from the necessity of proving it when produced by the subscribing witness. If it were so, it would follow that if a party were fixed with the possession of an instrument affecting his property, however questionable its execution might be, and even though he had impounded it because it was forged, or had been obtained by fraud; the party attempting to avail himself of it would, according to this argument, be relieved from the necessity of calling the subscribing witness. This case, which has been so recently decided, is not distinguishable from the present: the agreement there called for was, like the conveyance here, an instrument to which the Plaintiff was a party, and which was in the hands of the Plaintiff. It is immaterial what are the contents of the instrument; the only questions to be asked are, who are the parties to it, and in whose hands is it found. This decision has, ever since it was pronounced, been acted on at *nisi prius*, and there is much reason in it. A party who does that which in fairness and in duty he is bound to do, by producing upon notice any instrument he has in his hands, does not thereby dispense with the proof which is required in all other cases, the testimony of the attesting witness, who perhaps may know some fraud, or other peculiar circumstances under which the execution was obtained.

Lens, *contrà*, was stopped by the Court.

MANSFIELD C. J. There can be no doubt in this case. The case decided before Lord *Ellenborough* might be perfectly right: the mere possession of an instrument does not dispense with the necessity which lies on the party calling for it, of producing the attesting witness.

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An inftance is properly put in the cafe of a will, cited in *Gordon* v. *Secretan*, as having been tried before Lord *Kenyon*; for fuppofing that an heir at law is in poffeffion of a will, and the devifee brings an ejectment, and calls on the heir to produce the will; there the heir claims, not under the will, but againft the will, and it would be very hard that the will fhould be taken to be proved againft him, becaufe he produces it: but that is very different from the cafe where a man is called on to produce the deed under which he holds an eftate. The Defendant has no intereft in the fee-fimple of the eftate, if this deed does not convey it: confequently, if he produces the deed under which he claims, fhall it not be taken to be a good deed fo far as relates to the execution, as againft himfelf? There muft neceffarily, therefore, be a new trial in this caufe.

The reft of the Court concurring,

Rule abfolute.

MORGAN, on the Demife of DOWDING, Efq. v. BISSELL.

July 2.

Whether an inftrument fhall be a leafe, or only an agreement for a leafe, depends on the intention of the parties, as it is to be collected from the inftrument.

Strong circumftances of inconvenience apparent on the inftrument, if it fhould be conftrued as a leafe, indicate the intention of the parties that it fhould be an agreement only.

Such as a ftipulation that out of the rent mentioned, a proportionate abatement fhould be made in refpect of certain excepted premifes; for until that was apportioned, the leffor could not diftrain.

And a ftipulation that the tenant fhould hold at and under all ufual covenants as between landlord and tenant where the premifes are fituate; for it may be difputable what are ufual covenants.

THIS ejectment was tried at the *Hereford* fpring affizes 1810, before *Lawrence* J. and a verdict was taken for the Plaintiff, with liberty for the Defendant

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to move to set it aside, and enter a nonsuit, in case the Court should be of opinion, that the instrument put in evidence amounted to a lease of the farm in question. The instrument, when produced, appeared stamped with a sixteen shilling agreement stamp, and with a thirty shilling deed stamp also: it was dated on the 2d of *October* 1806, and the contents were in substance as follows: "Mr. *Dowding* agrees to let to Mr. *Bissell* all that farm in the parish of *Cradley*, (except 3 pieces of land, containing 5 acres or thereabouts, and except all trees, saplings, coppices, woods, and underwoods, with liberty to fell and carry away the same,) to hold from the 29th of *September* last, for the term of 21 years, determinable at the end of the first 14 years on 12 month's notice, at the yearly rent of 226*l.*, payable on the 25th of *January* yearly, and at and under all other usual and customary covenants and agreements, as between landlord and tenants, where the premises are situate. Mr. *Bissell* to spend six waggon loads of *Worcester* dung annually, over and above what is made upon the land; to remove the stocks in *Pontix Pitch*, (except the pear trees,) into or round the piece of land called *Old Cradley*, at his own expence: Mr. *Dowding* to allow 26*l.* a-year for manure, 10 loads to be spent annually on the meadow land; — to erect a cowshed, pitch the stable, and pale the fold-yard; — to put new gates where wanting; the fold-yard to be completed in a month from this time; the same to be kept in repair by Mr. *Bissell*, being allowed timber in the rough; to have the use of limestone in the coppice adjoining, for the farm, and for sale 150 loads: to allow a proportionate part of the rent from *Michaelmas* to *Christmas*; to put and keep the tiling in repair during the term; to allow a proportionate part of the rent for the three pieces of land above excepted. Witness our hands, 1st *October* 1806, *John Dowding, Joseph Bissell.*" This instrument was signed on un-

stamped

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stamped paper, at the office of the attorney for both parties, who afterwards, about the end of the year 1809, without any especial direction from the Defendant, caused it to be stamped with an agreement stamp, but afterwards, in *February* 1810, a short time before the trial, caused it to be stamped with a lease stamp at the Defendant's request. The Defendant entered on the farm in pursuance of the agreement, as from *Michaelmas* 1806, and paid rent. A draft of a lease was afterwards prepared, but the parties' being unable to agree on the covenants to be inserted, it never was executed. In *January* 1808, the Defendant received notice to quit at *Michaelmas* 1809. In order to shew that this instrument amounted to a lease, for the Defendant the case was cited of *Poole* v. *Bentley*, 12 *East*, 168.; but for the Plaintiff the distinction was taken, that there the concluding words, "this agreement to be considered "binding till one fully prepared can be produced," made that to be a lease; but that the general rule was, whether a future instrument is contemplated. *Lawrence* J. saw nothing in this paper that looked to a future lease, and what passed afterwards was not material. Where there is an instrument, by which it appears that one party is to give possession and the other to take it, that is a lease, unless it can be collected from the instrument itself, that it is an agreement only for a lease to be afterwards made.

Williams Serjt. having in this term obtained a rule *nisi* that the verdict might be set aside and a nonsuit entered,

Best Serjt. now shewed cause. He contended, that the intention of the parties was to be collected, not merely from the contents of the instrument, but from all ancillary circumstances. It was, however, clear, even

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from the contents of this paper, that it was not the instrument intended to regulate the interests of these two parties during the term agreed on. The relation of landlord and tenant is not complete unless the landlord can distrain. In the beginning of this instrument is an agreement for the yearly rent of 226*l.*, but in a subsequent part of it is a stipulation, that the landlord shall allow a proportionable part of that rent to be deducted in respect of the three excepted closes. Until that proportion was ascertained, there was no fixed rent, consequently no distress could be taken. It is further stipulated, that the demise is, at and under all other usual covenants. A covenant necessarily implies, that the terms are to be defined by a deed under seal, whereas this instrument was not under seal; and that the Defendant understood it to be an agreement only, may be inferred from the circumstance of an agreement stamp being affixed to it, and still more strongly from the circumstance of a draft of a lease being afterwards prepared by the direction of the parties, and broken off because they could not agree what were the covenants to which this contract bound them. Besides, if this were the final instrument, it would be necessary in declaring thereon, first, to aver and prove what were usual and customary covenants, which would be extremely inconvenient, and never could have been the intention of the parties. [*Lawrence* J. The argument is not, that no further instrument was intended, but that the first instrument conveys an interest as a lease, and that the future lease is in the nature of a further assurance.] This is very distinguishable from *Poole* v. *Bentley*, which was an agreement for a building lease, and there a separate lease was to be granted of each house successively, as it should be finished, in order to make a distinct title and apportionment of ground-rent to each subordinate purchaser. Nothing of that sort appeared here: and the acts of the

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parties, denote as strongly as any express declaration they could have made, their intention of having a lease. He also cited *Sturgeon* v. *Painter*, *Noy*, 128.; *Goodtitle*, *on demise of Estwick*, v. *Way*, 1 *Term. Rep.* 735.; *Doe*, *on demise of Coore*, v. *Clare*, 2 *Term Rep.* 739.; *Roe*, *on demise of Jackson*, v. *Ashburner*, 5 *Term Rep.* 163.; and though that case turned upon the want of a stamp, yet the executing an agreement without a stamp, indicated that the parties intended an agreement for a lease, not a lease; for an agreement stamp could always be afterwards affixed after execution, upon payment of the penalties; a deed stamp could not, until a very recent change made in the practice of the stamp-office. He also cited *Doe*, *on demise of Bromfield*, v. *Smith*, 6 *East*, 530.

Shepherd and *Williams*, Serjts., *contrà*. Every instrument in writing must speak for itself, and the intention of the parties cannot be tried by parol evidence, or any acts or matters out of the instrument. It is not conclusive against its being a lease, that it thereby appears that some further instrument is to be prepared, for if it also appears that the possession was intended to pass by the first instrument, it is a good demise, notwithstanding the intention to make further assurance. *Drake* v. *Munday*, *W. Jon.* 231. S. C. *Cro. Car.* 207. *Tisdale* v. *Essex*, *Hob.* 34. *Cro. Eliz.* 33. *Waldon's case*. If one say to me, "you shall have a lease of my lands in *D.* for 21 years, paying therefore ten shillings *per* annum: make a lease in writing, and I will sign it." This was agreed to be a good lease by parol, although no writing be made of it; for the intent of the lessor is sufficiently expressed, and the making of it in writing is but for further assurance. 2 *Bl.* 973. *Baxter*, *on demise of Abrahall*, v. *Browne*. The lessors agreed with all convenient speed to grant a lease to *Browne*, and they thereby set and let to him the premises; the agreement then pro-

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ceeded to ſtipulate that the leaſe ſhould contain uſual covenants, and certain ſpecial ones, in one place whereof occurred the words "this demiſe." And the Court held that the inſtrument amounted to a leaſe. [*Lawrence* J. The circumſtances there ſhewed the party's intent to be ſo; on which the Court relied in giving judgment.] They admitted that ſome of the modern caſes had relaxed the old rules, and countenanced the idea that where the parties contemplated a future inſtrument, that intention ſhould control the words of preſent demiſe. But moſt of the caſes where it had been ſo held, were caſes in which circumſtances ſtrongly ſhewed the intention of the parties that the inſtrument ſhould not amount to a leaſe, as in *Doe, d. Coore,* v. *Clare;* where, if it had been a leaſe, the leſſor would have incurred a forfeiture of his copyhold. In the caſe of *Doe, on the demiſe of Bromfield,* v. *Smith,* a new limitation of the eſtate, in favor of the leſſor's ſon, was to be made in the leaſes, which was not contained in the agreement; if, therefore, the poſſeſſion had paſſed by the agreement, it would have paſſed unfettered by that limitation, which was not to take place till a leaſe was executed. In *Goodtitle, ex dem. Eſtwicke,* v. *Way* was an expreſs agreement that leaſes with the uſual covenants ſhould be executed before *Michaelmas.* *Barry* v. *Nugent,* cited in *Roe* v. *Aſhburner,* is a much ſtronger caſe than this; for there, although an expreſs agreement for a future leaſe was inſerted, the inſtrument was held to be a leaſe on account of the words of preſent demiſe. There is nothing on the face of this agreement by which the parties have bound themſelves, or which renders it neceſſary for them, to have any future leaſe. If, in order to avoid the expence which long leaſes now occaſion, and to ſave words, the parties chuſe to frame a leaſe by demiſing according to the cuſtom of the country, or under and ſubject to all uſual covenants, it would be a good leaſe. It is not the leſs operative becauſe

because extrinsic evidence must be given to try what is the custom of the country. Provisos for the lessor's re-entry in case the lessee shall not cultivate and manage the land according to the custom of the country are common. Powers to lease according to the custom of the country are frequent in settlements. What covenants are usual, is to be determined by matter dehors the settlement; and why may not it be so with regard to a lease? If a lease under seal had been granted for 21 years, at 226*l.* rent, *habendum*, by, under, and subject to all usual and customary covenants and agreements, that would have been a good lease without more. Every thing which requires to be specifically stated, and cannot be expressed by reference to other contracts, such as the removing the stocks, ascertaining the quantity and description of manure, and the particular buildings, repairs, and improvements to be performed, is already specified. If the lessor could not distrain in this case, there are many leases on which no distress can be taken; as where there is a liberty for the landlord to resume a part of the premises, abating out of a gross reserved rent, a proportionable rent or value for the part resumed: but the answer is, *id certum est, quod certum reddi potest:* and it is to be ascertained by appraisement. If there be an eviction for part of the premises demised, there shall be an apportionment of the rent; and there the amount is to be ascertained by a jury: it does not avoid the whole lease. [The court, interposing, relieved them from answering the argument raised from the affixing first of an agreement stamp, and then of a deed stamp; the only thing to be considered was the intention of the parties at the time of executing this contract as therein expressed.] A covenant for a future lease is often inserted in leases where it is not necessary, in order to avoid a doubt: besides, covenants for further assurance are common in leases, especially in the building leases of

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noblemen about this metropolis, who never grant their leffees accefs to their title-deeds, but inftead thereof, infert this covenant. *Gainsford* v. *Griffith*, 1 *Saund.* 58. *f.* is a cafe of the affignee of a term recovering upon the affignor's abfolute covenant for title. A leafe needs not to be under feal: and it is for the good of the commonwealth, and the advancement of agriculture, to uphold this fort of contracts, as leafes. Upon the covenant for further affurance the Defendant has two remedies, either to fue for damages on the covenant, or to go into a court of equity to enforce a fpecific performance of the covenant. *Iggulden* v. *May*, 9 *Vef.* 325. decided, both that a court of equity would enforce a covenant clearly expreffed for renewal of a leafe, and that the acts of the parties were not admiffible as evidence to explain the meaning of the inftrument.

MANSFIELD C. J. This fort of queftion which we are now about to decide, is an extremely unpleafant one; the good fenfe is with the modern cafes. When the party enters into that, which on the face of it appears to be an agreement, though there are words of prefent demife, yet, if you collect on the face of the inftrument the intent of the parties to give a future leafe, it fhall be an agreement only. It is true, as hath been faid, that in moft of the cafes there have been pofitive agreements for a future leafe, and that there is none fuch here; but the real queftion is, what did thefe parties intend? Now the Plaintiff's leffor *agrees to let* to the Defendant, (not ufing the ftrong words which are in *Barry* v. *Nugent*, and other cafes,) all that farm, except, &c., and he goes on to make particular provifions, and then he fays, "at the yearly rent of 226*l.*, and under all ufual covenants and agreements as between landlord and tenant where the premifes are fituate:" this is not the language in which a lawyer would introduce into a leafe the techni-

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cal covenant for further assurance, but contemplates the entire making of an original lease. Then follows a partial apportionment of the rent from *Michaelmas* to *Christmas*, which I do not understand; for the date is the 2d of *October*: but then comes an apportionment of the rent for the excepted premises. Now, do these words imply, or not, that one of the parties should grant and the other accept a further lease? Would any landlord or tenant of common sense enter on a term for 21 years, without ascertaining what were the terms on the one side and the other by which they were to be bound for 21 years, and what was to be the rent apportioned for the excepted premises? The landlord thinks he is injured by a breach of covenant, and brings an action; and then it is to be gone into what are the proper covenants according to the custom of the country! In like manner they must go to a jury to see what is the rent of the excepted land. Does not then this agreement clearly imply that the parties meant to have a lease? The landlord did not mean that the tenant should hold, nor did the tenant mean that the landlord should have the rent, without previously ascertaining what was the rent, and what were the terms on which he should hold. We must therefore presume that they meant to have a further lease: and then, according to the doctrine of the modern cases, no present interest is conveyed under this instrument: and it would be a very wise rule that wherever one person is about to grant, and another to take a lease, until the lease was actually executed, no interest at law should pass. As to the question, what are usual covenants, it is an endless source of litigation. I have known parties long hung up at an enquiry before a Master of Chancery, what are the usual covenants, and it is the extreme of folly either to give or take possession under such an agreement, till a lease is executed, but the convenience of parties sometimes requires it.

Rule discharged.

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July 3 (a)

——, Demandant; SHAW, Tenant; HAWKINS, Vouchee.

Recovery amended by inserting a messuage recently built upon part of the premises.

ROUGH Serjt. was permitted to amend a recovery suffered of a messuage and garden in *Albemarle-street*, which garden extended to *Dover-street*, and on part whereof another messuage, fronting to *Dover-street*, had lately been built, by inserting a specific description of the last-mentioned messuage, upon an affidavit that it was intended to pass, and the deed to lead the uses conveying all the estate of the vouchee.

(a) On this day, and during the remainder of the term, *Chambre* J. was prevented by indisposition from coming into court.

July 3.

COX v. RODBARD.

No suggestion is necessary under 8 & 9 *W.* 3. *c.* 11. upon a warrant of attorney conditioned for payment by instalments.

THE Defendant being indebted to the Plaintiff in 1347*l.* 10*s.* for goods, gave the Plaintiff a warrant of attorney to confess a judgment in the penal sum of 1500*l.* conditioned for the payment of 1347*l.* 10*s.* and interest, together with such sum as the Plaintiff should have paid in continuing an insurance of the like amount on the Defendant's life, which the Plaintiff was thereby authorizedto do, until the whole of the said debt should be fully paid by instalments, viz. 300*l.* on the 30th *October* 1809, and 1047*l.* 10*s.* together with interest, and also the premiums of insurance paid, on the 15th *April* 1810. Judgment was soon afterwards entered up on the warrant of attorney: and the Defendant having paid the first instalment of 300*l.*, and the further sums of 84*l.* and 800*l.* only on account, the Plaintiff issued a writ of execution, and levied 234*l.* upon the Defendant's goods, to satisfy the residue.

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Williams Serjt. had on a former day obtained a rule *nisi* for setting aside the *capias ad satisfaciendum*, and restoring the monies levied, upon the ground that the Plaintiff had not issued any writ of *scire facias*, nor executed any writ of inquiry thereon pursuant to the statute of 8 & 9 *W*. 3. *c*. 11.

Shepherd Serjt. against the rule contended that no suggestion was necessary in this case.

Williams and *Best* Serjts. in support of the rule, urged, that this warrant of attorney being given in a larger sum than the debt actually due, by way of penalty, conditioned for the payment of the instalments, there was as much reason why the statute should apply to require a suggestion in this case, as in the case of bonds conditioned for payment of annuities, the amount of the annuity payments being in all such cases sufficiently certain without the intervention of a jury, yet the statute required it.

The Court asked whether there were any instance of a suggestion being necessary where the security was merely a warrant of attorney; and observed, that if the doctrine contended for was correct, a writ of *scire facias* would be necessary upon every subsequent breach; which the Defendant's counsel admitted, but could cite no instance where a suggestion had been held requisite on a warrant of attorney.

Mansfield C. J. This argument would extend to every warrant of attorney where the payment is to be made by instalments, so that it must be decided by a jury whether such instalments have been paid or not. But this case is not within the mischief intended to be remedied by the act, which was made to preclude the necessity

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necessity of going into a court of equity. The common law courts have ever exercised an equitable jurisdiction over their own judgments and process. The Plaintiff comes here to complain of an irregularity, not to seek redress on the merits. If it were necessary, the Court would direct an issue to try whether the instalments had been duly paid or not, but the Plaintiff suggests nothing with respect to the merits. It is wholly a new motion.

Rule discharged with Costs.

July 3.

Roper *v.* Bumford.

If a landlord direct a tenant, who is overseer of the poor, to pay on the landlord's account, rates irregularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation.

THIS was an action brought to recover for the use and occupation of 50 acres of land in the parish of *Church Lynch*, in the county of *Worcester.* Upon the trial of this cause at the *Worcester* spring assizes 1810, before *Wood* B., it was proved that the Defendant, being overseer of the poor, the Plaintiff, with full knowledge of the irregularity of certain poor-rates which had been informally assessed upon the Plaintiff for other land in the same parish, had directed the Defendant's son, who was collecting rates for his father, to pay those rates upon the Plaintiff's account, and to set them off against the rent; saying, he knew the levy was not a legal levy, but the rent should eat out the levy. The Defendant sought to set off against 55*l.* 9*s.* rent, which was proved to have accrued, 33*l.* 4*s.* for bark sold, and these poor-rates so paid. The price of the bark was accordingly proved and set off, but *Wood* B. thought the Defendant was not entitled to set off the illegal levies: he thought it was like the case of the demand of money by a public officer, and a promise made to pay him, when the officer had no authority to exact the sum demanded, and he thought

thought that promise would be void in law, and therefore could not be made the subject of a set-off. The jury accordingly found a verdict for the Plaintiff, with 20*l.* 5*s.* damages.

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Shepherd Serjt. having in *Easter* term moved to set aside the verdict and have a new trial, upon the ground of a misdirection upon this point, and having obtained a rule *nisi*,

Lens Serjt. now endeavoured to shew cause against the rule, contending either that the Plaintiff's promise to allow these rates by way of set-off was without consideration, or that the Defendant ought to have shewn that he had actually disbursed the rates to the poor, or paid the money over to the new overseer, of which he had offered no evidence. This was merely a promise to pay an illegal debt.

But the Court held that it was more than a promise, and was equivalent to an actual payment of the money into the Plaintiff's hands, and made the

Rule absolute.

1810.

July 3.

Doe, on the Demise of Sheppard, *v.* Allen.

If a lessee exercise a trade on the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by, and witnessing the act for six years, waive the forfeiture.

Some positive act of waiver, as receipt of rent, is necessary.

But if he permits the tenant to expend money in improvements, *semble* that that is evidence to be left to a jury of his consent to the alteration of the premises.
Per Mansfield, C. J.

THIS was an ejectment brought to recover possession of a messuage and shop in *Northgate-street*, *Bath*, which the lessor of the Plaintiff, by lease of the 18th day of *December* 1802, had demised to *William Dore*, his executors, administrators, and assigns, for the term of 28 years, determinable on lives; "provided, that if the "lessee, his executors, administrators, or assigns, should, "at any time thereafter during the term thereby granted, "permit or suffer any person or persons to inhabit or "dwell in or upon the demised premises, or any part "thereof, who should therein use, exercise, carry on, or "follow, (amongst other the trades therein enumerated,) "the trade of a butcher, or any other dangerous, noisy, "noisome, or offensive trade or calling whatsoever, or if "all, or any one or more of the covenants, clauses, and "agreements therein contained on the part of the lessee, "his executors, administrators, or assigns, should, dur-"ing the term, be infringed or broken in any respect "whatsoever, then it should be lawful for the lessor "to re-enter." And the lessee covenanted "that he, his "executors, administrators, and assigns, would not, "during all or or any part of the term, exercise upon "all or any part of the premises, the trade of a butcher, "&c. or any other dangerous, noisy, noisome, or of-"fensive trade or calling whatsoever." Upon the trial of this cause at the *Taunton* spring assizes 1810, before *Graham* B., it appeared that the lessee *Dore* had, in *July* 1803, for the consideration of 95*l*., assigned the premises to the Defendant; who thereupon partitioned off the shop into two separate apartments, in one of which he carried on the business of a fishmonger, and the other he had let on lease to *Loder*, a butcher, who

therein

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therein carried on his trade. The Plaintiff, from the time of the aſſignment to the time of the trial, continued to live next door to the demiſed premiſes, and was witneſs to their converſion to theſe obnoxious uſes. The Defendant had paid his rent during that period to *Dore*, and could not prove any payment of rent by *Dore* to the Plaintiff's leſſor ſubſequent to the alteration. For the Defendant it was urged, that the circumſtance of his having ſo long ſeen the nuiſance, without interfering, was evidence of a waiver of the forfeiture; but *Graham* B. thought there muſt be evidence of ſome poſitive act of waiver, and that mere ſilence was not ſufficient. The jury found a verdict for the Plaintiff.

Lens Serjt. having in *Eaſter* term obtained a rule *niſi* to ſet aſide the verdict and have a new trial,

Beſt Serjt. ſhewed cauſe. [*Mansfield* C. J. obſerved, there was a circumſtance which had not been adverted to: it was ſuggeſted, that a great deal of money had been laid out by the Defendant in altering and improving theſe premiſes; that was not merely a circumſtance for the conſideration of a Court of equity: if the Plaintiff lay by and ſaw that laid out, it was a ſtrong circumſtance from which a jury might imply conſent to the alteration.] No ſuch fact appears on the judge's report. The covenant is unqueſtionably broken, and the only queſtion is, whether there has been any waiver. How long muſt a man lie by, before his long-ſuffering ſhall amount to a waiver? It has never yet been held that lying by would conſtitute a waiver of a breach of covenant. But if the Defendant has laid out money, of which there is no evidence, it is his own folly that he did not firſt tender his rent: if that had been received, he might have ſpent his money ſafely; without that precaution, he was ſpending it in his own wrong.

Lens

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Lens in support of the rule. It is not necessary there should be an actual payment of rent to constitute a waiver; that is only *exempli gratiâ*: any other evidence of waiver is equivalent. It ought to have been left to the jury, whether the Plaintiff's lessor had made his election to determine the lease or to confirm it; for the lease is not made absolutely void, but only rendered voidable by the breach of covenant; and the lessor must elect whether he will enter or not. However, nothing in the evidence shews that, during this long period, the rent was not accepted; and the jury ought to have presumed that it was. The Plaintiff might easily have proved that the lessor never received this rent, and might have shewn the reasons why he did not. [*Heath* J. The Plaintiff is not bound to prove a negative.] It ought to have been left to the jury, whether the Plaintiff had not, at some one moment, assented to these acts.

Mansfield C. J. I do not know how it is possible to help this Defendant. The lessor having let to *Dore*, with a covenant not to exercise certain trades, *Dore* underlets to the Defendant, and the Defendant trades contrary to the covenant: the Plaintiff lives next door, and must be taken to have known the alterations in the state of the premises. Supposing no money to have been laid out in improvements, and of that there is no evidence, the suffering him to go on, is an indulgence to the tenant; after a time the lessor brings an ejectment, and what you ought to prove is, that he consented to the change: now you have not shewn that he has since, either directly or indirectly, received any rent; and if he had, it is probable he gave *Dore* a receipt, and *Dore* would have produced it to uphold the beneficial lease.

Heath J. was of the same opinion. Forfeitures of lease stand on the same ground with forfeitures of copy-hold;

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hold; and there are a great many cases in the old books, where it is held, that a mere knowledge and acquiescence in an act constituting a forfeiture, does not amount to a waiver: there must be some act affirming the tenancy.

LAWRENCE J. The rule must be discharged.

Rule discharged.

HALHEAD *v.* ABRAHAMS.

July 3.

After nonsuit for a variance, in an undefended action on a replevin-bond, the Court permitted the record to be amended, and a new trial to be had.

THIS was an action on a replevin bond. Upon the trial of the cause at the *Lincoln* spring assizes 1810, before *Bayley* J., the Defendant did not appear, and the learned judge, on comparing the record of the declaration with the bond produced in evidence, discovered a fatal variance, three dozen of chairs being mentioned in the bond, and four dozen in the declaration, upon which the Plaintiff was nonsuited; but *Bayley* J. said that, if he had been a judge of the court where the action was brought, he would have amended the declaration *pro tanto* at the time of the trial.

Shepherd Serjt. in *Easter* term, moved to set aside the nonsuit and amend the declaration, on the authority of *Grundy* v. *Mell*, 1 *New Rep.* 28., and *Holland* v. *Hopkins*, 2 *Bos.* & *Pull.* 243., where the Court permitted amendments after trial, and he said it ought the rather to be permitted in this case, because, as the Defendant did not appear at trial, he had incurred no costs.

MANSFIELD C. J. allowed it on payment of the costs occasioned by the amendment, that is, in this case, the same costs as if it had been amended before the trial, by summons before a judge in *London*. [When amendments are made at the trial, they are made without costs.]

Rule absolute.

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July 4.

O'CALLAGHAN *v.* Marchionefs THOMOND.

The affignee of an *Irifh* judgment by cognovit may fue in this country in his own name.

The *Irifh* ftatutes 9 *G.* 2. and 25 *G.* 2., which permit conufees of judgments to affign them, and the affignees to fue in their own names, are confined to judgments upon *cognovits.*

THIS was an action of debt againft the Defendant, as (*a*) executrix of the late Marquis of *Thomond*, upon fimple contract for 7000*l*. The firft count fet out certain *Irifh* ftatutes of 9 *Geo.* 2. *c.* 5. and 25 *Geo.* 2. *c.* 14., whereby conufees of judgments are allowed to affign them, and the affignees of fuch judgments may fue out execution, and bring actions of debt on fuch judgments, in their own names. The count further ftated that *Lawrence Comyn*, in *Trinity* term, in the 42d year of his Majefty's reign, in the court of Common Bench in *Ireland*, before the Right Honourable *John* Lord *Norbury* and his brethren, juftices, &c., by the confideration and judgment of the faid Court, recovered againft the teftator as well a certain debt of feven thoufand pounds fterling money, that is to fay, of current money of *Ireland*, as alfo 4*l*. 4*s*. 6*d*. of like money for his cofts, and then proceeded to fhew an affignment to the Plaintiff, and a memorial enrolled in purfuance of thofe ftatutes. There was a fecond count on an account ftated. To the firft count, there was a general demurrer and joinder. The ftatute 9 *Geo.* 2. *c.* 5. after reciting that judgments, ftatutes ftaple, and ftatutes merchants, are frequently affigned for valuable confiderations, and to protect the purchafe of eftates, but are no more than equitable fecurities in the hands of the affignees, and that affignees of fuch judgments, ftatutes ftaple, or ftatutes merchants, as the law then ftood, could not revive or difcharge the fame in their own names, but in the name of the conufees of fuch judgments, ftatutes ftaples, or ftatute merchant, or their reprefentatives, which was often attended with very great inconveniences, and the conufee might, after fuch affignment, enter fatisfaction

(*a*) See note, *Vaughan* v. *Plunkett*, at the end of this cafe.

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on the record of such judgments, statutes staple, or statutes merchant, without the knowledge or consent of the assignee, enacts, "that where any conusee or conu-"sees of a judgment or judgments, statute staple, or "statute merchant, his, her, or their executors or ad-"ministrators, shall assign the same, such conusee or "conusees, his, her, or their executors or administra-"tors, shall also perfect a memorial of such assignment," with such formalities as therein are mentioned. The second section enacts, "that after such memorial en-"rolled, such assignee or assignees, and no others, may, "in their own names, revive such judgment, statute, "&c. and take out execution, discharge the same, and "enter satisfaction on the record; and that the conusor "or conusors of such judgment or judgments, statute, "&c., his, her, or their executors, administrators, or "assigns, may, upon payment to such assignee or assig-"nees, plead payment specially to such assignee or assig-"nees." The stat. 25 *Geo.* 2. *c.* 14., which is entitled "An act to explain and amend" the former act, after reciting that some doubts had arisen upon the construction of the former act, so far as the said act relates to the assignment of judgments and statutes in the several courts of law therein mentioned, for the removing of such doubts, declares, "that every assignee or assignees of every "judgment or judgments, statute staple or merchant, "that were then assigned, or which thereafter should be "assigned on record, by virtue of the said act, his, her, "or their executors, administrators, or assigns, may not "only revive such judgment, &c. from time to time, in "his, her, or their own name or names, and take out "one or more execution or executions thereon for the "recovery of his, her, or their demands thereon, as by "the said act among other things is directed, but also "that such assignee or assignees of such judgment, &c. "now assigned or hereafter to be assigned by virtue of

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"the said act, his, her, or their executors, administrators, "or assigns, may bring an action of debt, or otherwise "proceed or sue thereon, in his, her, or their own name "or names, and be considered to all intents and purposes "in the place, stead, and condition, either in law or "equity, of the assignor or assignors."

Peckwell Serjt., in support of the demurrer, admitting the general principle, that the law of one country would recognize and enforce obligations raised by the law of another country, contended nevertheless, that the rule extended only to the substance of the contract, but could not transfer to another country the form of recovering, nor contravene the general principle of the *English* law, that *choses in action* were not assignable; consequently that no action could be sustained in this court on the judgment, otherwise than in the name of *Comyn*. Nevertheless, he was aware of the case of *Innes* v. *Dunlop*, 8 *T. R.* 595. But the Court intimating a strong opinion against him upon this ground, he objected that on the face of this declaration the Plaintiff did not bring himself within these statutes, which extended only to judgments by *cognovit*; whereas if this form of declaration were sufficient, there was no assignee of a judgment recovered in any shape whatever in *Ireland*, whether upon demurrer, verdict, or by default, who could not prove the allegation contained in this declaration, that the Plaintiff recovered by the consideration of the Court: this would be the inevitable consequence, if for conusee the Court could read recoveror. There was a known distinction between the two words: conusee meant only the Plaintiff to whom a judgment was acknowledged. The *English* statute 32 *Hen.* 8. *c.* 5. "for the continuation of debts upon execution," distinguishes between recoverers, obligees, and recognizees. The *Irish* legislature contemplated only such judgments which may be said to be in

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the nature of obligations, in like manner as fines and common recoveries, though judgments of the Court, are in the nature of common assurances of land. They would have used the word recoverers, if they had meant to extend the act to all judgments whatsoever, and had not meant to confine it to judgments by *cognovit*.

Runnington Serjt., *contrà*, contended that the stat. 25 *G.* 2. was meant to apply to judgments of all sorts, and between all parties whatsoever: for, although the stat. 9 *G.* 2. applies to judgments by *cognovit*, there are no means to distinguish on the record of a judgment, whether it passed on a *cognovit* or otherwise. But, all the Court and the officers denying this, he contended that it was only matter of form, and inasmuch as there was no special cause of demurrer assigned, no advantage could now be taken of it.

The Court, however, being unanimous that it was matter of substance, he prayed leave to amend, which was granted, if, upon enquiry, he should find that the judgment was in fact a judgment by confession, so that he could avail himself of the indulgence.

Assumpsit lies on an *Irish* judgment since the *Union*.

(*a*) *Vaughan* v. *Plunkett*, C. B. *June* 5, 1810, sittings at *Westminster* after *Easter* term cor. *Chambre* J. *Assumpsit* upon a judgment in the Court of *Exchequer* in *Ireland*. *Dampier*, for the Defendant, objected that since the *Union* of *Great Britain* and *Ireland*, *assumpsit* could no longer be maintained upon an *Irish* judgment, because it was a record of the *United Kingdom*, and might be brought over to the House of Lords here. *Chambre* J. It was removeable to the House of Lords before the *Union*; but I will reserve the point. *Verdict* for the Plaintiff, but the Defendant never moved the case.

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July 4.

SOULSBY, Assignee of HALLIDAY, a Bankrupt, *v.* LEA.

If the Plaintiff retains the venue upon the usual undertaking to give material evidence within the county, yet if the plea and issue joined be such as to render that evidence irrelevant, the performance of the undertaking is dispensed with.

Thus, if the local evidence be the trading of a bankrupt, or a petitioning creditor's debt within a county, yet if the defendant do not give notice of his intention to dispute the commission under 49 *G.* 3. *c.* 121. *s.* 14., so that the mere production of the commission and proceedings under it proves the trading and petitioning creditor's debt, *semble* that the undertaking needs not to be further complied with.

SHEPHERD Serjt. had on a former day obtained a rule *nisi* to change the venue in this case from *Yorkshire* to *Worcester*.

Clayton Serjt. now shewed cause, upon the ground that the Plaintiff was the assignee of a bankrupt, and it might happen that the Defendant might dispute the commission of bankrupt under which he derived title: he therefore claimed, that if the Defendant did dispute it, the Plaintiff might be permitted to undertake to give material evidence in *Yorkshire*, inasmuch as the trader had resided, and the commission was opened, at *Bradford*, in that county; and thereupon he would be entitled to have the venue restored: but if the Defendant would not dispute the commission, he did not wish to have it restored. The stat. 49 *G.* 3. *c.* 121. *s.* 14. requires the party who means to dispute a commission, to give notice of his intention: and unless that notice is given, it is now unnecessary to do more than to give in evidence the commission and the proceedings under it; but the notice need not be given by a Defendant until the time of plea pleaded: whereas, a venue is changed before plea. He conceived, therefore, that the circumstance of the plea not being accompanied with such a notice, would render unnecessary the local evidence, which, without such notice, would be material and necessary; and he cited the case of *Cockerell* v. *Chamberlayne*, *ante* 1. 518, to shew that where the plea is such as to render it irrelevant to the issue to prove the local circumstances, which the Plaintiff undertook to prove arising within the county, the undertaking to give material evidence in the county where the venue is laid, is thereby dispensed with.

MANSFIELD

MANSFIELD C. J. put him to his election whether he would undertake to give material evidence in *Yorkshire*?

LAWRENCE J. observed, that if, upon consideration, he felt confident that the case cited applied to the present case, he was safe in undertaking to give material evidence, in the present circumstances: and the rule was accordingly discharged, on the usual undertaking of the Plaintiff.

SOUTHCOTE, Executrix of SOUTHCOTE, Esq. *v.* HOARE, Bart.

July 4.

By indenture tripartite between *A.* 1, *B.* 2, *C.* 3. *A.*, tenant for life, demised to *C.*; and *C.* covenanted with *B.* (a receiver,) and other the receiver or receivers for the time being, and to and with such other person, who, for the time being, should be entitled to the freehold, and to and with every of them. *A.* died; held that his executrix could not maintain covenant for breach in her testator's lifetime, but that the action was joint, and survived to *B.*

A covenant with two and every of them is joint, though the two are several parties to the deed.

THE Plaintiff, as executrix of the last will and testament of *Thomas Southcote*, deceased, declared in covenant against the Defendant upon an indenture of lease of 3 parts, made between the said *Thomas Southcote* in his lifetime, (therein described as tenant for life of the real estate of *John Southcote*, deceased,) of the first part, *Thomas Charlton*, (therein described as the receiver appointed by the High Court of Chancery of the rents and profits of the estates of the said *John Southcote*,) of the second part, and the Defendant of the third part: whereby, after reciting that *John Southcote*, by his last will, had given a leasing power, under the restrictions therein mentioned, to every person to whom any estate for life in the premises was thereby devised, when and as they should respectively be in the actual possession thereof, the said *J. Southcote* demised to the Defendant the manor, farm, lands, and premises, called *Bruham Lodge*, in the county of *Somerset*, therein particularly

 described,

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described, with the appurtenances, to hold the same unto the Defendant for the term of 16 years. And the Defendant thereby, for himself, his heirs, executors, and administrators, covenanted to and with the said *Thomas Charlton*, and other the receiver or receivers for the time being, (and to and with such other person or persons as, for the time being, should or might be entitled to the freehold or inheritance, or to the rents and profits of the said premises,) and to and with every of them, by the said indenture, amongst other things, to repair the premises, and the same, so repaired, at the determination of that demise, to yield up to the said *Thomas Charlton*, or such future receiver or receivers, or other person or persons for the time being entitled as aforesaid; and not to suffer cattle to feed in the coppices demised, nor fell, damage, or dispose of any timber trees or saplings. By virtue of which demise the Defendant entered and was possessed, and continued possessed until the death of the said *T. Southcote*, the reversion of and in the same premises with the appurtenances belonging to the said *Thomas Southcote*, as tenant for the term of his natural life, under and by virtue of the said will, and the said *Thomas Southcote* during all that time being entitled to the freehold of the said premises, to wit, as tenant thereof for the term of his natural life. And the Plaintiff averred breaches in the life of *Thomas Southcote*, in not repairing, in depasturing cattle in the woods, and in cutting and destroying timber, by the Defendant himself, and the like breaches committed by one *Thomas Andrews*, who was then and there the assign of the Defendant, and so the Defendant had not kept his covenants with the testator *T. Southcote* in his lifetime, or with the Plaintiff, executrix as aforesaid, since his death; to the damage of the Plaintiff, with a profert of the letters testamentary. To this declaration the Defendant pleaded in bar, that the said *Thomas Charlton* duly

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duly ſealed, and as his act and deed delivered the ſaid indenture, and ſurvived the ſaid *Thomas Southcote*, and was ſtill in full life. There was a further plea, traverſing the breaches aſſigned. The Plaintiff demurred to the firſt plea, and the Defendant joined in demurrer.

Shepherd Serjt. endeavoured to ſupport the demurrer. He contended that inaſmuch as the covenant was to and with every of them, there were ſeveral covenants. The deſign was, that there ſhould be one ſeveral covenant with *Charlton*, which, if *Charlton* had ceaſed to receive, and a new receiver was appointed, would be a covenant to and with the new receiver, but which, if no new receiver were appointed, would be extinguiſhed; and that there ſhould be one other ſeveral covenant with *Thomas Southcote*, and other the perſon entitled to the rents and profits for the time being, which covenant would remain although the other ſhould be extinguiſhed. It has been held that where the intereſt is joint, the word each makes no difference, and does not conſtitute a ſeparate covenant, but here the intereſts are ſeveral, and therefore every, which is ſynonymous, ſhall have that effect. *Thomas Southcote* was intereſted to receive the rents and profits on his own account during his life: the office of receiver had a view to the intereſts of ſome other parties, which makes this caſe diſtinguiſhable from thoſe of *Rolls* v. *Yate*, *Yelv.* 177. S. C. by name of *Yate* v. *Rolles*, 2 *Gouldſb.* 207. *Yate* v. *Roules*, 1 *Bulſt.* 25. *Slingsby*'s caſe, 5 *Co.* 19. *Duke of Northumberland* v. *Errington*, 5 *T. R.* 522. *Anderſon* v. *Martindale*, 1 *Eaſt*, 497. This is not an indenture by *Southcote* and *Charlton* of the firſt part, but by *Southcote* of the firſt part, and *Charlton* of the ſecond part. Suppoſe the Court of Chancery ſhould now take away the receiverſhip from *Charlton*, without appointing another receiver, there would be no one who could ſue on this

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covenant. This plea moreover is bad, becaufe it does not fhew that *Charlton* continues receiver.

Beft Serjt., who was prepared to fupport the plea, was ftopped by the Court.

MANSFIELD C. J. It may be the practice of the mafter's office to frame the covenants in this way, but I do not think it is. It is a ftrange thing. The demife is by the tenant for life. The mafter's office is much puzzled upon this fubject, but in practice, they ufually caufe the receiver to demife under the order of the Court, who can convey no legal intereft; but whenever they can, they get a tenant for life, or a truftee of the legal eftate, to join. It is urged for the Plaintiff, that to and with every of them, means with each of the two feparately; but it would be very ftrange if it were fo; it means, with every of the receivers and with the perfon entitled, jointly; and certainly it is important that the action fhould not be brought by a reprefentative who pays no cofts, but by fome one that is liable to cofts. *Charlton* muft be taken to be receiver ftill.

LAWRENCE J. There is a great deal of difference between covenants where the parties covenant jointly and feparately, and where they covenant with them and every of them: in the former cafe the covenantees clearly have feparate actions.

Judgment for Defendant.

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SWINNERTON *v.* Marquis of STAFFORD. *July* 4.

Where there has been but a short time for investigating a question of real property, of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the jury, and the Court does not think their verdict wrong, yet if the inheritance is to be bound for ever by the verdict, the Court will grant a new trial on payment of costs.

Antient grants are not to be received in evidence, unless they can be accounted for, as coming from the hands of some one connected with the estate to which they relate.

THIS was an issue under an inclosure act, to try whether the Defendant, who was seised in fee of a tenement in the occupation of a tenant named *Knight*, had a right of common in respect of that tenement over *Motherfall* common, otherwise *Wybbenhall* heath, in the county of *Stafford*, the waste directed to be inclosed. Upon the first trial before *Lawrence* J. at the *Stafford* *Lent* assizes 1810, the Defendant offered in evidence, 1. An old grant to the priory of *Stone*, brought from the *Cottonian* MSS. in the *British Museum*. *Lawrence* J. rejected this, first, on the authority of the case of *Michell* v. *Rabbetts*, still pending in the *Exchequer*, where a grant to the *Abbey of Glastonbury* contained in a curious manuscript book entitled the *Secretum Abbatis*, preserved in the *Bodleian* library at *Oxford*, was rejected as not coming from a proper custody; and secondly, because these were entries made by the monastery of their own rights. Secondly, an old grant of common made by *John De Trussell* in 1342, to the priory of *Stone*, given by a friend of the Plaintiff, not connected with the estate, to the Plaintiff, as a curiosity. This the learned Judge rejected for the like reason, the possession of it not being sufficiently accounted for, nor connected with any one who had an interest in the land. It appeared that the commissioners had in the month of *August* preceding the trial, upon examination of evidence, allowed the claim of the Defendant. There was much conflicting parol testimony on both sides as to the question whether the tenants of the tenement in right of which the claim was made, had been accustomed to turn out their cattle on the *locus in quo*, or on one of the two adjoining commons called *Normacott* common, and *Burlastone* common, all three

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three of which, until lately, lay open to each other, and from either of thofe two the cattle put there ftrayed *pur caufe de vicinage* into *Motherfall common.* The queftion went fully to the jury upon the contrary evidence, and the jury found a verdict for the Defendant, confirming the decifion of the commiffioners.

Lens Serjt. having in *Eafter* term 1810 obtained a rule *nifi* for a new trial,

Williams and *Vaughan* Serjts. now fhewed caufe. The Defendant produced numerous witneffes who had feen the fheep turned out from *Knight*'s tenement upon *Motherfall* common, and the evidence was left to the jury, who are the proper tribunal to decide a doubtful point.

Lens, contrà, relied on the pointed evidence of one witnefs, who remembered many years fince meeting the tenant of *Knight*'s tenement driving his flock from the common, and hearing him affign as his reafon for fo doing, that the common was going to be driven, and that his fheep would be impounded; and alfo on a piece of evidence, that anciently there was no gate or opening directly leading from *Knight*'s tenement to *Motherfall* common, until about 66 years fince; when a wicket had been made through a fence of the farm abutting upon *Motherfall* common, through which the fheep ufed to be driven out to pafture there, and which wicket was ftopped up about 45 years fince, foon after a remonftrance made by the lord's bailiff againft the turning out of fheep there by the tenants of *Knight*'s tenement; alfo that at a later period the tenant of *Knight*'s tenement had been long accuftomed to turn out his fheep to common through a gate called the *Foldgate,* which led out upon *Normacott* common; but that the commoners of *Normacott* having made a fence to divide that common from *Motherfall,* this

this gate afterwards communicated only with a drift way, left without the fence, for accefs to *Knight's* tenement; upon which occafion the tenant of *Knight's* tenement complained that he now had no way to get out upon either of the commons, and in confequence he cut a gap through a corner of a wood in another part of the farm which abutted on *Normacott* common, and from that time forward fuffered his fheep to ftray out on the common through that gap, until *Normacott* common was finally allotted and inclofed by virtue of an act of parliament.

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MANSFIELD C. J. The point that weighs moft in this cafe on the part of the application for a new trial, is, that it is a queftion involved in great doubt, great obfcurity, and of great value; and the verdict in this cafe binds the right for ever. There are three commons of great extent, running for miles, all uninclofed; cattle wrongfully turned on, pafs from one to another, and it is no one's bufinefs to turn them off. It is of little importance to the people of *Motherfall*, whether the cattle are immediately turned out on *Motherfall*, or on *Normacott*, whereon *Knight's* tenement certainly had common before the inclofure: and perfons in fuch a ftate of things are naturally very inattentive to the place where they are turned on. A lord of a manor, or his agent, might think it worth while, if he faw cattle improperly turned on, to order them off, in order to provide againft any future conteft, but the commoners have no intereft; for whether the cattle are turned out on one common or the other, they would very foon find their way to that common where is the beft pafture. There are feveral circumftances in this cafe which throw a doubt on the Defendant's right of common. Firft, there was antiently no place through which cattle could be turned out from this farm on *Motherfall* common; this wicket being comparatively modern, and the opening through the

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wood quite recent. There was an opening to the road, but that led to *Normacot* common; and it would be a very ſingular circumſtance if there was a right of common and no way to get at it. The evidence of the man, who heard at 10 years old the converſation between the lord's bailiff and the tenant, inſiſting on the latter ſtopping up the wicket, is in ſome degree confirmed by the wicket being now ſtopped up. And no reaſon other than the abſence of common right is aſſigned to account for that circumſtance. The obſervation, "Now we cannot get out on either common," is equivocal, but the laſt-mentioned circumſtances and the making a way through the wood to *Normacott* common, certainly deſerved conſideration. And although the deciſion of the commiſſioners on the claim was made in *Auguſt*, and ſeven months elapſed before the time of the trial, yet that is not a very long time for the inveſtigation of a matter, from its nature involved in ſo much doubt and obſcurity: and ſince much pains ſeem to have been taken, and the ſubject-matter is of great value, and the inheritance is to be bound for ever by the verdict, and ſince it is very poſſible that more light may be thrown on it, it is better that it ſhould go down to a further inveſtigation. But the new trial muſt be had on payment of coſts, and the perſon who applies for it would not be wiſe to pay the coſts, and to try it again, unleſs he could throw more light on the ſubject. The Court does not decide that the preſent verdict is wrong; but for the reaſons above-mentioned it may be more ſatisfactory that the caſe ſhould undergo another inquiry.

Rule abſolute upon payment of coſts.

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COX *v.* BRAIN.

July 5.

THIS was an action for the rent or price of certain tithes. The declaration stated, that in consideration that the Plaintiff would let to the Defendant certain tithes arising upon a certain part or portion of a certain meadow called *Botley* meadow, for a certain space of time, to wit, one year, commencing from the 25th of *March* 1808, and would suffer the Defendant to have and take the same for the said time, the Defendant undertook to pay him therefore 41*l.*, to wit, 5*l.* immediately, and the residue on or before the 25th of *March* 1809: the Plaintiff then averred, that he did let to the Defendant the said tithes, and did permit and suffer him to have and take them for the said time. The second count stated, that the Defendant was indebted to the Plaintiff for certain tithes arising upon and from certain lands in the parish of *St. Thomas*, in the suburbs of the city of *Oxford*, and due and of right payable to the Plaintiff, as proprietor thereof, by the Plaintiff bargained and sold to the Defendant, and by the Defendant, according to that bargain and sale, had, enjoyed, and taken; and that the Defendant undertook to pay. The next count was on a *quantum valebant*, for tithes of the like description. There were also counts for goods sold and delivered, and on an account stated. The Defendant, as to all the said several supposed promises, except as to 15*l.*, *parcel of the several sums claimed*, pleaded that he did not undertake, and as to the 15*l.*, parcel of the said several sums, he pleaded a tender, and brought the same into court. He also pleaded a set-off. The Plaintiff took issue on the tender and and set-off. Upon the trial of this cause at the last *Oxford* Spring Assizes, before *Wood* B., it appeared that the Plaintiff, who was lessee of the tithes in question, under *Christ-church* in *Oxford*, on

If the bargainee of tithes for one year underlet them to the several occupiers of the land, no notice to determine the underletting needs to be given by another bargainee of the same tithes for the following year.

A tender admits the contract and facts stated in the declaration: therefore where a count averred that in consideration that the Plaintiff would let to the Defendant certain tithes, the Defendant agreed to pay 41*l.*; and that Plaintiff did let the said tithes, and did permit the Defendant to take them, a tender on all the counts generally precluded the Defendant from shewing a legal interruption to his taking them, if any such interruption had subsisted.

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on the 4th of *April* 1808, expofed them to be let or fold by auction; the conditions of fale were, that the renter of the lots fhould pay immediately into the hands of the auctioneer 5*l.* as a depofit, as part of payment, and fign an agreement for payment of the remainder on or before the 25th of *March* 1809, if required. That the letting of the lots fhould commence from the 25th day of *March* then laft paft, and that the purchafers fhould give up their lots on the 25th day of *March* 1809. The Defendant was declared the higheft bidder for the firft lot, which was the tithe of about 100 acres, more or lefs, of *Botley* meadow, and fix acres of pafture land, at 41*l.*, and he paid into the hands of the auctioneer 5*l.* on account. The titheable land in *Botley* meadow was in the hands of nine occupiers, and the tithes had in the preceding year been let by the Plaintiff on fimilar conditions, but at the rent of 23*l.* only, to *Chillingworth*, the occupier of the largeft parcel of the land out of which they iffued, and he had underlet to the feveral other occupiers the tithe of their refpective lands. This circumftance was publicly ftated at the time and place of the auction. The Defendant, having previoufly informed the occupiers of his intention, began to collect the tithes in kind; but after he had taken up the tithes of two or three occupiers, the reft of them refufed to fet out their tithes, alleging that they had received no notice to determine their compofitions of the preceding year, but they offered the fame fums, as compofitions, which they had paid to *Chillingworth*: thefe however the Defendant refufed to accept. The Defendant tendered to the Plaintiff for the tithes the fum of 15*l.*, which was admitted to be a fully proportionate value for thofe tithes which he had collected in kind. *Wood* B., at the trial, was at firft of opinion that the Plaintiff could not recover, becaufe he had not given the land-occupiers that notice to fet out their tithes, which he thought was neceffary to deter-

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mine their pre-exifting compofition, and to put the Defendant in poffeffion of the tithes which he had contracted for; the Plaintiff urged, on the authority of *Yate* v. *Willan*, 2 *Eaft*, 128. and 1 *Term Rep.* 464. *Cox* v. *Parry*, that by the plea of tender, and payment of money into court upon all the counts, the Defendant had admitted the fpecial contract, and that nothing remained to be proved, but the amount of the damages he had fuftained, which he contended was the difference between 15*l.* and 41*l.* The jury however, under the direction of the learned Judge, found a verdict for the Defendant, but liberty was referved to the Plaintiff to move to enter a verdict for the Plaintiff.

Accordingly, in *Eafter* term *Williams* Serjt. moved, as well on the ground that the contract ftood admitted by the payment into court, as alfo on the ground, that *Chillingworth*, whofe intereft was determined, could impart to his undertenants no greater eftate than he himfelf poffeffed, and that therefore no notice to them was neceffary. The Court granted a rule *nifi* on both points.

Shepherd Serjt. in this term fhewed caufe. The Plaintiff having tendered the value of fo much of the tithe as he actually had poffeffion of, the plea of *non affumpfit* as to the refidue is proved. The Defendant went on collecting tithe until he was ftopped by this compofition being fet up, and which was the default of the Plaintiff, and all that he collected he paid for. [*Mansfield* C. J. That would be a very good defence as to the refidue beyond the 15*l.* upon the iffue of *quantum valebant*, if the Defendant had not admitted the fpecial count.] And likewife upon the count for tithes fold, and delivered. And unlefs the tender be an admiffion of the caufe of action, the Defendant is clearly entitled to the verdict on the firft count. The feller is bound to put

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the buyer in ſuch a condition, that he may receive his tithe without diſpute or trouble. [*Heath* J. The ſeller is bound to warrant him againſt all lawful claims; no further.]

Lawrence J. Could *Chillingworth* bind the eſtate longer than during his intereſt?

Mansfield C. J. (ſtopping *Williams* and *Peckwell* Serjts., who were prepared to ſupport the rule,) How can you argue it? You have paid money into court generally; you now intend to apply it to the *quantum valebant*, and you inſiſt on the ſufficiency of that ſum as your defence, ſaying that as to the ſpecial contract the Plaintiff could not perform his part of it, and put you in poſſeſſion of the tithes, as he engaged to do. If you relied on that point, you had a plain way to proceed, by pleading *non aſſumpſit* to the firſt count, and paying the money into court on the *quantum valebant* only: but here, by inadvertency, you have by your tender admitted the ſpecial contract, and therefore you cannot deny it.

Rule abſolute.

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July 5.

TRESPASS for breaking and entering four closes of the Plaintiff, situate in the parish of *St. Bartholomew*, in the county of *Sussex*, and treading down and spoiling the grass, and subverting the soil; and, with sledges and other iron instruments, breaking down, prostrating, and destroying the hatches, penstocks, weirs, and dams of the Plaintiff, there then erected, and throwing the materials into a certain watercourse, where they were lost. The Defendant pleaded, first, not guilty. Secondly, as to the breaking and entering one of the closes, treading down a little of the grass, and there subverting the Plaintiff's soil, and with sledges and other iron instruments breaking down, prostrating, and destroying the hatches, penstocks, weirs, and dams; that the Defendant, long before, and at the said several times when, &c. was lawfully possessed of a certain dwelling-house, with the appurtenances, in the parish of *St. Peter-the-Great*, otherwise the *Sub-deanry*, in the said county of *Sussex*, near to the said close in which, &c. and also near to a certain watercourse, running and flowing in

No one can claim a prescription in his own land.

If an act immemorially done in the land of *A.*, at each repetition produces an effect on the land of *B.*, which, under the ordinary state and disposition of *B.*'s land occasions no perceptible injury, there is no ground to presume a grant from the ancestors of *B.* to the ancestors of *A.* of the right of doing that act.

Therefore if *B.* makes a new application and disposition of his land, of such a sort that the effect produced in the land of *B.* by the repetition of the act done in the land of *A.* becomes injurious to the property of *B.* under such new disposition of his land, *A.* is not authorized in repeating that act.

But if the effect produced on the land of *B.* by the act done in the land of *A.* had at all times occasioned a perceptible injury to *B.*'s property, there would have been sufficient ground to presume a grant from the ancestors of *B.* to the ancestors of *A.* of the right to do such act.

A. has immemorially had, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates and thence passes through the contiguous soil of *B.* below the surface without producing visible injury. *B.* builds a new house in his land, below the level of his soil, in the current of the percolating water: *A.* cannot now justify filling his channel, if the percolating water thereby injures the house of *B.* *Per Lawrence* J.

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and along the fame clofe, and that the water of the faid watercourfe, before, and until the time of the obftruction thereof hereafter mentioned, had run and flowed, and had been ufed and accuftomed to run and flow, and then and from thence until, and at the faid feveral times when, &c. of right ought to have run and flowed, and ftill of right ought to run and flow, freely and without any undue obftruction or hindrance; and the Defendant averred, that the faid hatches, penftocks, weirs, and dams, before and at the faid feveral times when, &c. had been, and were, unlawfully kept fhut and faftened, and kept and continued to be fhut and faftened, by the Plaintiff, for *a great and unreafonable length of time*, fo that the water of the faid watercourfe could not run and flow in its ufual and accuftomed manner, but was obftructed and kept back by the faid hatches, penftocks, weirs, and dams, infomuch that by reafon thereof divers large quantities of water, which would otherwife have run and flowed away from the faid dwelling-houfe, were prevented and hindered from fo doing, and by means of the premifes, ran, flowed, and penetrated into the Defendant's dwelling-houfe, &c.; for the purpofe of abating and removing which obftruction and nufance, the Defendant juftified the acts complained of. The third plea, after the fame introduction as in the fecond, ftated, that the Plaintiff, before and at the faid feveral times when, &c. did *wrongfully and injurioufly*, by and *with the hatches, penftocks, weirs, and dams* in the declaration mentioned, and *by wrongfully and injurioufly keeping the fame fhut and faftened, caufe and procure divers large quantities of water to accumulate and increafe in and upon the faid clofe* in which, &c., and which, before and at the faid time when, &c. ought to have run and flowed off and from the faid clofe, in which, &c., and away from the dwelling-houfe of the Defendant, and by *reafon whereof*, divers large quantities of *water*, before and

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and at the said several times when, &c. *ran and flowed unto and into the same dwelling-house*, &c. wherefore he justified the acts complained of. The fourth plea, after a similar introduction, averred, that the Plaintiff, before and at the said time when, &c. *wrongfully and injuriously kept and continued the said hatches, penstocks, weirs, and dams shut, closed, and fastened*, in and across a certain watercourse in the said close in which, &c. and thereby caused and procured divers large quantities of water, before and at the said several times when, &c. to arise, accumulate, and increase in and upon the said close in which, &c., and *by reason thereof divers large quantities of water*, before and at the said several times when, &c. *were hindered and prevented from running and flowing from the said last-mentioned dwelling-house* of the Defendant, and greatly overflowed and damaged the same, &c.; wherefore, &c. The Plaintiff joined issue on the first plea; and in his replication to the second plea, admitted the Defendant's possession of his house as therein described, but, protesting that the water of the said watercourse, before and until the time of the obstruction thereof in that plea mentioned, had not run and flowed, and had not been used and accustomed to run and flow, and then, and from thence until, and at the said several times when, &c. of right ought not to have run and flowed, and still of right ought not to run and flow freely, and without any undue obstruction or hindrance, he averred, that long before and at the said several times when, &c. *Thomas Peckham Phipps* Esq. was seised in his demesne as of fee, of and in the said close in which, &c. and of and in another close called the *Twenty Acres*, adjoining thereto, and situate in the said parish of *St. Bartholomew*, with their respective appurtenances; and prescribed in right of his estate of and in the said close called the *Twenty Acres*, for an immemorial right to stop up and

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dam, with hatches, penstocks, weirs, and dams, the water of the said watercourse in the said close in which, &c., for the purpose of turning the said water out of the said watercourse into, through, and over the said close in which, &c., in order to, and for the purpose of watering, meliorating, and improving the said other close called the *Twenty Acres*, every year, at all times of the year, as often as occasion hath required, as to the said close called the *Twenty Acres*, with the appurtenances, belonging and appertaining, to wit, at the parish of *St. Bartholomew* aforesaid. He then averred, that *T. P. Phipps* demised both closes to the Plaintiff, who afterwards, and before the said times when, &c., to wit, on the day last aforesaid, at the same parish, being a time when occasion required, did stop up and dam the water of the said watercourse, by then and there putting down and placing the said hatches, penstocks, weirs, and dams in the said close in which, &c., for the purpose of turning the water of the said watercourse out of the same, into, over, and through the said close in which, &c., in order to, and for the purpose of watering, meliorating, and improving the said close called the *Twenty Acres*, and kept and continued the same, so put down and placed there, as the occasion then required, in exercise of the said right, as he therefore lawfully might, until the Defendant, of his own wrong, at the said several times when, &c. committed the several trespasses, &c.; and concluded by traversing that the said *hatches, penstocks, weirs, & dams*, before and at the said several times when, &c., had been and were *wrongfully shut and fastened, and kept*, and continued so shut and fastened, by the Plaintiff, for a great *and unreasonable length of time*. To the third plea, the Plaintiff, omitting the protestation, replied the same facts as in the replication to the second plea, and traversed that he did *wrongfully and injuriously, by and with the said hatches, dams, and weirs, and*

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by wrongfully and injuriously keeping the same shut and fastened, cause and procure the said large quantities of water to accumulate and increase in and upon the said close in which, &c., and which before and at the said time when, &c. ought to have run and flowed off and from the said close in which, &c. to and away from the Defendant's dwelling-house. To the fourth plea the Plaintiff replied in the same manner as to the third, and concluded with traversing that he *wrongfully and injuriously kept and continued the said hatches, penstocks,* &c. *shut, closed and fastened in and across the said watercourse,* and thereby *caused and procured divers large quantities of water to arise, accumulate, and increase in and upon the said close in which,* &c. The Defendant in his rejoinder took issue on these several traverses. Upon the trial of this cause at *Horsham*, at the Spring Assizes 1810, for the county of *Sussex*, before *Heath* J., the case was this: The river *Lavant* flows from east to west, under the southern wall of the city of *Chichester*. At a certain place situate at the eastern end of the city, and lying to the east of the *locus in quo*, and of the turnpike road hereafter mentioned, part of the water is occasionally diverted, for the purpose of irrigating a meadow called *Grove's* meadow, lying wholly to the east of, and abutting on the same turnpike road. This road issues from the south gate of the city, and goes from north to south. Many houses had been recently built without the gate both on the eastern and on the western sides of this road. On the western side stood the Defendant's house, erected within six or seven years past, abutting on the road, and situate on a part of a close called *O'Brien's* garden, which extended about 180 yards in length, parallel to the road, and 50 in breadth. From the increase of the city, the frontage of this close towards the road had recently become building ground. The soil of the ground on which the Defendant's house stood, had been excavated, and thereby lowered about two feet, a

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ſhort time before the houſe was built. The Defendant had alſo ſunk, nearly four feet below the ſurface, the floor of his underground cellar and kitchen; at the time of building them he was warned that they would be ſubject to floods. On the weſtern ſide of *O'Brien's* garden, and abutting thereon, and on the ſouth ſide of the river *Lavant*, lay a tract of meadow land called the *Deanery* farm, being all the property of one perſon, in truſt for whom Mr. *Phipps* was ſeiſed thereof in fee, comprehending, amongſt other lands, *Weller's* cloſes hereafter mentioned, and the two cloſes mentioned in the pleadings. An artificial cut, or main feeder, of indefinite, but of great and unqueſtioned antiquity, paſſed from the river *Lavant* at the north-eaſtern corner of this farm, through a part thereof occupied by *Weller*, along the eaſtern ſide of it, and contiguous and parallel to the weſtern ſide of *O'Brien's* garden, flowing to the ſouthward, for the ſpace of 180 yards, within which diſtance the Defendant's houſe was ſituate; ſo that this watercourſe paſſed parallel to and beyond the back front of that houſe, being about 50 yards diſtant from it in the neareſt point, and alſo parallel to the turnpike road. This feeder was prolonged northwards in a direct line beyond that length of 180 yards, for the purpoſe of watering other meadows occupied by *Weller*, not material to this caſe; but at the end of the 180 yards there was a penſtock, or row of hatches, fixed acroſs the feeder for the purpoſe of excluding the water from the prolonged part thereof, and cauſing it to flow over a weir or caſcade ſituate in *Weller's* ground, on the weſtern ſide of the ſtream, at that point, the altitude or perpendicular fall of which weir was two feet ſix inches. When theſe hatches were ſhut down, all the water fell over this weir, and at and from that point changed its courſe, and flowed from eaſt to weſt, down a channel cut at right angles to the firſt-mentioned feeder, for the ſpace of 200 yards, in the courſe

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course of which distance it passed through a pond, situate about midway. At the western extremity of the 200 yards, another penstock, or row of hatches, was placed across the continuation of the watercourse, one post of the frame thereof being in a field occupied by *Weller*, situate on the southern side of the stream, and the other post of the frame thereof being placed in the Plaintiff's close called the *Thirty Acres*, which lay on the northern side of that part of the stream: and at the same point commenced another feeder, the course of which diverged a little to the south-east, and passed into the Plaintiff's close called the *Twenty Acres*, mentioned in the pleadings. When the hatches across the watercourse at this point were shut down, the water was penned back in the watercourse throughout the space that lay between that point and the pond, and was raised to the height of three feet five inches from the groundsill of the last-mentioned penstock, in consequence of which elevation it flowed along the last-mentioned feeder, and performed the office of irrigating the 20 acres: but when this penstock was so closed, it did not pen back the water further to the eastward than the pond before-mentioned, so that the shutting of this penstock did not in any way affect the current throughout the space that lay above the pond eastward, up to the weir, much less could it affect the height of the water in the 180 yards of feeder situate above the weir, at the times when the water flowed over the weir. The top of the last-mentioned penstock, too, was two feet three inches lower than the plane of the bed of the feeder in the 180 yards above the weir; which bed was, as nearly as might be, in the same level with the floor of the Defendant's kitchen, and two feet lower than the bed of the *Lavant*; and the distance in a right line, drawn from this penstock to the Defendant's house, was 317 yards; and the whole fall of the ground from the Defendant's house to the same penstock, was five feet

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feet one inch. At the time mentioned in the pleadings, the firſt-mentioned penſtock was partly ſhut down; and the ſecond was entirely cloſed, for irrigating the 20 acres; and to increaſe the effect of the latter, ſome turfs and earth had been placed near the penſtock on each bank, to raiſe the head, (which the learned Judge thought was material); ſo that the water had riſen to the height of a foot above the top of the laſt-mentioned penſtock itſelf, and flowed over it: it was a wet ſeaſon, and the ſtream was very copious. The banks of theſe feeders, and the ſoil of the fields in queſtion, and of all the adjacent valley, conſiſt of a porous gravel, which is eaſily percolated by water. And the moſt judicious witneſſes who were called, ſtated that the water in the Defendant's premiſes was that which ſoaked through the bank of the neareſt water-courſe, namely, the 180 yards of feeder parallel to the back of his houſe. The Defendant found water ſeven inches deep in the kitchen and cellar of his houſe, and conceiving that it proceeded from the ſtream which was penned back for watering theſe meadows, he went with his ſervants in ſearch of the nuſances, in order to abate them. He firſt came to the penſtock neareſt to his houſe, ſituated in *Weller's* meadow, at the ſouthern extremity of the 180 yards, where he removed two boards, which, as they were before placed, had the effect of raiſing the water in the 180 yards length of the firſt main feeder. He then proceeded to the ſecond penſtock, at the weſtern end of the 200 yards, which he broke down, and thereby drew the water off from the feeder of the *Twenty Acres*, and let it paſs off weſtward down the lower channel. The water had at that time been penned on the meadows only three days: a month or ſix weeks was the time during which the water had uſually been kept on the land in former years. From the time of doing theſe two acts the water in the

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Defendant's houſe ſunk rapidly, and the floor became dry. But it appeared that about a week afterwards, the *Lavant* being greatly increaſed by the melting of the ſnows, which occaſioned a general flood, the Defendant's cellar became full of water again, and continued ſo for many weeks, though the penſtock ſecondly mentioned had not, during that period, been ſhut down, nor even repaired. The deſtruction of this, which was the Plaintiff's penſtock, was the act for which the Plaintiff intended to claim a compenſation by this action, but the parties went to trial upon the iſſues which have been ſtated. On the part of the Plaintiff it was attempted to ſhew, that the water in the Defendant's houſe proceeded, not from the watercourſe, but either from land ſprings, which were proved to exiſt near the ſpot, or from the irrigation of *Grove's* meadow, which lay, as before mentioned, on the eaſtern and oppoſite ſide of the road, on a higher level than the Defendant's houſe, or from ſprings which roſe in that meadow: but the Defendant clearly diſproved the firſt of theſe pretences, by proving that the water left his houſe, almoſt inſtantaneouſly, when he had done the acts complained of; and he ſhewed the futility of the others by the teſtimony of an intelligent ſurveyor, who lived directly oppoſite to the Defendant, on the eaſtern ſide of the road, and who proved, that when *Grove's* meadow was irrigated, his own houſe, and thoſe adjoining on the eaſtern ſide of the road, which were contiguous to the meadow, were incommoded by water coming into their lower apartments; and that too at times when the Defendant's houſe, and the other houſes on the eaſtern ſide of the road, were quite free from water; and that, *vice verſâ*, at the time of the injury complained of, and at other times, when the Defendant's houſe, and other houſes on the weſtern ſide of the road were flooded, his own and the other houſes on the eaſtern ſide were dry. The Plaintiff proved that the lower penſtock at the extremity of the 200

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yards had been erected 30 or 40 years ſince, that it had been uſed without interruption for 30 years, and that a penſtock had been remembered there for 70 years. On the other hand, the Defendant relied on a ſuppoſed inconſiſtency in the accounts given by two different witneſſes for the Plaintiff of the elevation to which the lower penſtock raiſed the water at different periods of time; one of whom ſtated that 40 years ſince it raiſed the relative height (in the watercourſe) of the water between the pond and the penſtock 18 or 20 inches, which ſufficed for watering the *Twenty Acres*, and penned back the water as far as the pond; whereas, another ſtated, that the total fall at the lower penſtock was three feet five inches; and the Defendant contended that this evidence proved that the lower penſtock itſelf had been recently enhanced: in order to combat the preſcription, he alſo proved by ſeveral witneſſes that inhabitants of the city of *Chicheſter*, which is much ſubject to floods from the *Lavant*, had, at various times, abated various penſtocks, and other erections which they deemed nuſances; among others the penſtocks in queſtion. Upon theſe iſſues and evidence, *Heath* J. directed the jury, that in caſe they ſhould be of opinion that the flooding of the Defendant's cellar was occaſioned by the penning of the water, the queſtion would be whether the penſtock had been properly kept ſhut, or whether it had been ſhut down an unreaſonable length of time, ſo as to occaſion an injurious annoyance to the Defendant's houſe. On the preliminary queſtion, the evidence of the ſurveyors was, as uſual, contradictory, but there was a fact worth a great many ſpeculations: the ſubſiding of the water left no doubt upon the point. If the Plaintiff had poſſeſſed an uninterrupted right to raiſe the penſtock to a certain height, it would not derogate from that right that the Defendant had thought proper to build a houſe, and make his kitchen deep in the ground: but the Plaintiff's

tiff's enjoyment had not been very peaceable; for whenever the neighbouring inhabitants felt any inconvenience, they went and pulled down the penſtock; from which, and from the different heights aſſigned to the penſtock, by different witneſſes, he thought there was concluſive evidence that the penſtock had been enhanced of late years from one foot eight inches, to three feet five inches; and, if the jury ſhould be of that opinion, there was ſufficient ground to find a verdict for the Defendant, which they accordingly did.

Shepherd Serjt., in *Eaſter* term, moved for a rule *niſi* to ſet aſide the verdict and have a new trial: he obſerved that the Defendant's rejoinder did not deny the Plaintiff's right to the penſtock. It was proved that at the time of the injury the water ran to the penſtock at the ſame height, and in the ſame manner, and the levels of the bed of the watercourſe behind the Defendant's houſe, and of the penſtocks, were the ſame, as, to the memory of all the witneſſes, had ever been the caſe; the top of the lower penſtock was two feet three inches lower than the foot of the caſcade which flowed over the weir, conſequently it was impoſſible that that penſtock ſhould make the water flow over the banks of the watercourſe into the Defendant's houſe. [*Heath* J. obſerved that it was not alleged that the injury was ſuſtained by the water overflowing the banks, but by its oozing through them, and through a porous and gravelly ſoil.] Even ſuppoſing the lower penſtock to have been the cauſe of the miſchief, it was of immemorial antiquity, and the houſe had been built only within ſix or ſeven years paſt: the Defendant, therefore, was not juſtified in demoliſhing the penſtock in right of his houſe; and even if the owner of the houſe had before this time, ſince its erection, deſtroyed the penſtock, he would not thereby eſtabliſh his right in deſtruction of the Plaintiff's preſcription.

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LAWRENCE J. You claim a prescriptive right to erect the penstock; now the penstock is in the Plaintiff's lessor's own grounds, and he may pen the water there as he will, until he does a damage to his neighbour, which may not have happened till now. Is it not law that you must so use your own as not to prejudice your neighbour? And until you prejudice your neighbour by penning the water, you do that which you have a right to do; but where you begin to injure your neighbour, there the right terminates. If there had been an ancient house, into which you had, by your penstock, immemorially caused the water to flow, without being encountered by any obstruction, it would have been evidence of a grant; but here is no such evidence.

MANSFIELD C. J. Upon the second and third traverses, which are hardly distinguishable from each other, and which go to the Defendant's right of erecting any penstock at all, the verdict certainly ought to have been for the Plaintiff; for it is plain that the cut must have at some time been made out of the river for the benefit of the land, which might anciently have belonged to the same person; but without penstocks he could not have the benefit of the cut: but, according to the terms of these two issues, the verdict precludes the Plaintiff from having any penstock at all.

LAWRENCE J. The Defendant does not contend that the Plaintiff has no right to any penstock at all, but that he has no right to erect a penstock which shall cause the water to flood his house.

CHAMBRE J. The Defendant's rejoinder should have pointed out, as a justification, some enhancement of the nusance: now it does not. And the interruption shewn to the exercise of the right occurred 50 years back.

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The Court recommended to the parties to refer the whole matter to arbitration, and desired it might stand over to give time time for an arrangement, but the Defendant not consenting, on a subsequent day, they granted a rule *nisi* for a new trial.

Best Serj. now shewed cause against this rule. The Defendant intended, by these issues, to dispute the Plaintiff's right to erect any penstock at all, and the jury, upon evidence, of which they are the proper judges, have found that point for him.

MANSFIELD C. J. observed that the two last issues were too loosely worded to try that right, for they had put no fact in issue: they alleged that the Plaintiff had shut the hatches wrongfully and injuriously; but they did not shew whether it was injuriously done, because the Plaintiff had no right to shut them at all, or whether it was, because they were kept shut at improper and unreasonable times, or for an unreasonable length of time, as alleged in the first issue.

HEATH J. observed that the first issue, on the reasonableness of the time, had admitted the Plaintiff's right to shut them for some time; and that, in fact, there was no evidence of their having been shut an unreasonable length of time, to support the verdict on the first issue.

Rule absolute for a new trial.

Best then prayed that the Defendant might be permitted to amend his pleadings, which the Court reserved for future consideration; still recommending to the parties to settle the whole matter by arbitration.

The case never again came before the Court.

1810.

July 6.

Rex v. Davey, in the Cause of Hacket v. Mewes and Another.

The Court of Common Pleas cannot apply the forfeited penalties of the recognizances of bail to attachments, to the discharge of the debt of the Defendant in the original action, and costs.

THE Plaintiff having issued a writ of *fieri facias* against the effects of the Defendant, and the levy having been frustrated by the violence of *George Davey* and *Thomas Davey*, an attachment was obtained against them, whereupon they put in bail to the attachment, and entered into recognizances in 50*l.* each, to the intent that they should appear and answer interrogatories, which the Plaintiff caused to be filed, but they never took office copies thereof, nor took any steps to save the forfeiture of their recognizances; and they had since absconded, and the several recognizances were forfeited. The recognizances were put on record; and the bail, on the Plaintiff's making application, had refused to make him any compensation.

Rough Serjt. moved that the bail of *Davey* might pay the Plaintiff the amount of the levy indorsed on the *fieri facias*, together with the costs of the attachment and subsequent proceedings, and the costs of this application, not exceeding the amount of their recognizances.

Mansfield C. J. This is a debt due to the King, and I do not see how we can help you.

Heath J. The recognizances of bail upon attachments are regularly estreated, and, of course, will have the same consequences as any other recognizances estreated in the Court of Exchequer. You may apply to that Court to try if you can obtain any assistance from them; but we cannot delay the estreating of the recognizances.

Rule refused.

1810.

HUNT, Administrator of CAMPBELL, *v.* STEVENS and Another.

July 7.

Whether a delivery of household goods was complete, the upholsterer still having a servant in the vendee's house, where the goods were, and the vendee not having yet taken any actual possession, *quære.*

If an administrator shews that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, he shews his administration to be void, and cannot recover.

Although he sues for a doubtful claim.

He must prove his administration, for that constitutes his title to recover.

And it will not suffice to sue out new letters of administration on a larger stamp after he has obtained judgment.

THE Plaintiff declared in trover, as administrator, for certain household furniture, upon a conversion alleged to have been made after the decease of the intestate. Upon the trial of this cause at the sittings at *Westminster* after *Hilary* term 1810, before *Mansfield* C. J., it appeared that the deceased employed the Defendants, who were upholsterers, to furnish a house which he had taken; and they had accordingly, about a fortnight before his death, sent in goods to the amount of, at least, 1300*l.*: they placed a man in the house, who indeed stated in evidence, that, without an order from the Defendants, he should not have permitted the deceased to take possession of the furniture; but the purpose for which he was placed there was the superintending repairs and disposing the furniture. The deceased had effected an insurance on the furniture to the amount of 700*l.*, the work was completed, and the deceased was preparing to go on the 5th of *February* to inhabit the house, but on the 3d of *February* he died. In the night of the 3d the Plaintiff, who was then a judgment creditor, and also had an assignment of the goods in question, but had never obtained an inventory of them, endeavoured to possess himself of these effects under an execution, but the Defendants privately conveyed them away in the course of the same night. The Plaintiff then took out letters of administration to the deceased upon a stamp for a value not exceeding 1000*l.*, as appeared by a copy of the bond given to the ordinary, entered in the books of the proper officer of the Prerogative Court, the letters of administration themselves being not produced. It was objected on the part of the Defendant, that

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that the ſtamp was of too low a denomination. *Manſfield* C. J. left it to the jury whether, before *Campbell's* death, there had ever been a complete delivery of the goods, ſuch as to put them wholly into the poſſeſſion of *Campbell*, and out of the power of the Defendants, or not, and the jury, thinking that there had not, found a verdict for the Defendants.

Vaughan Serjt. having in *Eaſter* term laſt obtained a rule *niſi* for a new trial,

Shepherd and *Lens* Serjts. now ſhewed cauſe. They contended that, upon the evidence, the delivery was not complete, the Defendant's ſervant ſtill continuing in poſſeſſion; and his cuſtody of the goods was at leaſt equivocal, and the deceaſed never himſelf had the poſſeſſion. [*Lawrence* J. ſuggeſted the caſe of a loſs by fire.] In many caſes goods are at the riſk of the vendee, to inſure from fire, although the right of ſtoppage *in tranſitu* remains with the vendor. Next, as to the title of the Plaintiff; it is true that adminiſtration is ſometimes taken out for too ſmall a ſum; but if that happens in conſequence of greater property being afterwards diſcovered, the adminiſtration is recalled, and other letters are granted with a ſtamp of a larger denomination; but unleſs this is done, the ſmaller ſtamp gives no validity to the grant, which may be inferred from the ſtatute 48 *Geo.* 3. *c.* 149. *ſ.* 35.: for that act expreſsly provides, that a probate or adminiſtration ſhall be valid for the purpoſe of transferring truſt property, notwithſtanding the truſt property ſhall not be included in the amount for which the probate or adminiſtration is granted: whence it ſeems to follow that, ſince this act, if the adminiſtration ſtamp be too ſmall to cover the whole amount of the beneficial property, the grant is void. Indeed, if this were not ſo, a perſon taking out adminiſ-

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ſtration for 1000*l.*, might adminiſter effects to the value of 100,000*l.*

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Beſt and *Vaughan* Serjts. *contrà*. As to the laſt objection, ſince the Plaintiff ſtyles himſelf adminiſtrator in the declaration, if the Defendants meant to have conteſted that fact, they ſhould have denied it by the plea. [*Lawrence* J. The plaintiff declares as adminiſtrator, and upon a converſion in his own time: it has been decided, that the ſtyling himſelf adminiſtrator is of no avail, he muſt prove himſelf to be ſuch; and the queſtion is raiſed by the plea of not guilty in trover, it goes to the foundation of the Plaintiff's title, and the want of adminiſtration need not therefore be ſpecially pleaded.] The temporal courts are bound to recognize this adminiſtration, which is the act of the ſpiritual court, as long as it remains unrepealed. But the queſtion does not ariſe upon the facts of the preſent caſe, for the only proof of the amount of the ſtamp was by the ſecondary evidence of the officer's books, which ought not to have been received. In ſuch a caſe as this, too, where the property is not in the actual poſſeſſion, although it is in the legal poſſeſſion of the adminiſtrator, he cannot know the exact value, and he is not bound to pay the duty on ſpeculation, and to look to the poſſibility of recovering every deſperate debt and hopeleſs claim. It will be ſufficient to ſatisfy the act if, after this claim is eſtabliſhed, the Plaintiff takes out a new adminiſtration upon a ſtamp of adequate amount. The act expreſsly provides, that reſiduary legatees may come in from day to day, to pay the duty on a reſiduary legacy, and the ſame reaſon holds with regard to an adminiſtrator; for at firſt he cannot foreſee the full amount of the property. He was proceeding to diſcuſs the merits, but was ſtopped by

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The Court, who declared that he could not arrive at the confideration of them, the preliminary objection being decifive. The act of 48 *Geo.* 3. *c.* 149. *f.* 8., for the purpofe of enforcing the payment of the ftamp duties, re-enacts all the provifions of former acts; and one of thofe regulations, as to the confequences of not obtaining the requifite ftamps, is, that no inftrument, not properly ftamped, fhall be given in evidence. The old ftatute of 9 & 10 *W.* 3. *c.* 25. *f.* 19. 59. firft contains the claufe containing this prohibition, and it has been continued through all fucceeding acts. The objection raifed to the fecondary evidence cannot avail the Plaintiff, for unlefs that evidence is admitted, there is no proof in the caufe of any adminiftration granted to him; and on this the foundation of his title refts. The act makes no allowance for lofs by debts; adminiftration muft be taken out for the full amount. According to the Plaintiff's argument, if the Plaintiff had taken out adminiftration to the amount of 10*l.* only, he could equally recover in this action, as now that he has taken it for 1000*l.*, and the confequence to the revenue would be moft pernicious; for if he were to recover property to the amount of 20,000*l.*, the adminiftration would ftill ftand good. The efpecial provifion made for the payment of an encreafed duty by refiduary legatees, fhews that, without fuch a provifion, the practice contended for cannot prevail.

Rule difcharged.

(*a*) *Chambre* J. was abfent this day, owing to indifpofition

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DUFRESNE *v.* HUTCHINSON.

July 7. (*a*).

If a broker, being authorized to fell goods for a certain price, fells them at an inferior price, he is not liable in trover for amount of the goods.

The proper remedy is by an action upon the cafe.

If the Plaintiff in an action commenced againft feveral tort-feafors, accept of a fum of money from one of them and drop that action, *femble* that he cannot fue the others.

THIS was an action of trover brought by the Plaintiff, who was a manufacturer at *Leeds*, againft the Defendant, who was a broker in *London*, to recover the value of certain cloths which had been configned by the Plaintiff to the Defendant for fale upon commiffion. Upon the trial of this caufe at *Guildhall*, at the fittings after laft *Hilary* term, before *Mansfield* C. J., it appeared that the Plaintiff had delivered the goods to the defendant, valued at the invoice price of 972*l.* 1*s.* 2*d.*, with pofitive inftructions not to fell even at one quarter *per cent.* below that price. The Defendant having advanced money to the Plaintiff on the credit of thefe goods, and finding himfelf unable to difpofe of them at the price prefcribed, became impatient, and placed the goods in the hands of certain other factors, named *Bowdler* and *Morley*, to be fold at all events for what they would produce, on the fole account of himfelf the Defendant, he having a lien on the goods for the advances he had made. *Morley*, being called as a witnefs, declared that he would not have paid over the proceeds to any perfon except the Defendant. It appeared, however, that the plaintiff ultimately knew of the delivery of the goods to *Bowdler* and *Morley*, and confented that they fhould fell them at a price feven and a half *per cent.* below the invoice price fixed; to which they anfwered, that fo fmall a reduction was merely nugatory; but it did not appear that the Plaintiff confented to any further diminution of the price. *Bowdler* and *Morley* fold the goods for fomewhat more than 600*l.*, being the beft price they could obtain. The Plaintiff had fued out a writ in a

(*a*) *Chambre* J. was abfent this day, on account of indifpofition.

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joint action against *Bowdler* and *Morley* and the Defendant; which he dropped upon receiving from *Bowdler* and *Morley* alone the sum of 200*l.*, and then commenced the present action against the Defendant. The jury found a verdict for the Plaintiff for the amount of the original invoice price, deducting therefrom the sums which the Defendant had advanced to the Plaintiff, and the seven and a half *per cent.* which the Plaintiff had consented to abate.

Cockell Serjt. had in the last term obtained a rule *nisi* for entering either a nonsuit, or a verdict for nominal damages only, upon two grounds. First, that as the goods lawfully came into the hands of the Defendant to be sold on commission, if he, either in person or by his agents, improperly and improvidently sold them, the plaintiff's remedy was by an action upon the case, not by an action of trover: and secondly, that supposing trover would lie, the sale actually made had furnished the true criterion of the real value of the goods, which was the proper measure of damages; and since the Plaintiff had consented that *Bowdler* and *Morley* should sell, and repay the Defendant the advances he had made, the Plaintiff was entitled to recover only the residue of the actual produce that remained after making that payment.

Best Serjt. now shewed cause. He contended, upon the authority of *Syeds* v. *Hay*, 4 *T. R.* 264., that where a bailee disposes of goods in a manner contrary to the directions of the bailor, as here, trover lies, and that the parting with the goods at a less price than the Plaintiff had fixed on them, was a conversion by the Defendant. He also cited the case of *Yowle* v. *Harbottle*, *Peake's N. P. Cases*, 49., where Lord *Kenyon* C. J. held, that if a carrier delivers goods to a stranger, he thereby becomes an

 actor,

actor, and is guilty of a conversion, for which trover lies. The Defendant in the present case was an actor, for *Bowdler* and *Morley* held themselves responsible to him only; and the money which they paid to the Plaintiff was not received by him in affirmance of their act, but was paid by way of buying off the action commenced against them for their misfeasance.

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Cockell, contrà, was stopped by the Court.

MANSFIELD C. J. observed, that it clearly appeared that the Plaintiff had authorized *Bowdler* and *Morley* to sell at a price not more than seven and a half *per cent.* below the invoice price. He could not therefore maintain trover against the Defendant for the goods sold by them, whom the Plaintiff had constituted his own brokers. The Plaintiff had also brought an action against them, and received 200*l.* in compensation for the injury of which he complained.

LAWRENCE J. Since the Plaintiff sued out a writ against *Bowdler* and *Morley* jointly with the Defendant, it must be taken that he meant to declare in such a form of action in which he could recover: it must be presumed, therefore, that he would declare for money had and received, not in trover; for the Plaintiff had given to *Bowdler* and *Morley* an authority to sell, and therefore could not recover against them in trover. But by declaring for money had and received, the Plaintiff would affirm the sale: besides, if trover had been the right form of action, it would be a question whether the discharge made to one tort feasor would not be a release to all: if it were otherwise, the Plaintiff might get paid by each Defendant to the whole amount of the injury sustained.

Rule absolute to enter a nonsuit.

1810.

July 11.

DOE, on the Demise of DAVID WHAYMAN and Another, *v.* CHAPLIN.

If four joint-tenants jointly demise from year to year, such of them as give notice to quit may recover their several shares in ejectment on their several demises.

THIS was an ejectment brought on the several demises, amongst others, of, 1. *David Whayman*, *John Hunt*, *William Read*, 2. *David Whayman*, 3. *John Hunt*, 4. *William Reed*, 5. *George Beedon*, *David Whayman*, *William Read*, *John Hunt*, to recover the possession of 32 acres of marsh land in the parish of *Sudborne*, in the county of *Suffolk*. At the *Bury* Lent assizes 1810, before *Grose* J.. it appeared, that by copy of court-roll, dated the 20th of *July* 1784, upon the surrender of *Robert Brady*, these lands, which were copyhold, were granted to *George Woolnough*, *George Beedon*, *David Whayman*, *William Read*, and *John Hunt*, their heirs and assigns, and the heirs and assigns of the survivor of them, upon certain charitable trusts, devised by the will of *Thomas Grimbold*, deceased. *Woolnough* was dead. In 1796, the four surviving trustees demised to *John Ablett* for three years, from the 5th *January* 1797, at the rent of 1*l.* 10*s.* *per* acre, during which term *Ablett* died, and upon his death the Defendant, who was his executor, entered, and continued tenant under the same rent, until the 27th *June* 1808, when the Defendant was served with a notice from "each and every of the undersigned, to quit, at *Old Christmas-day* then next ensuing, or at the time when his current year's occupation should expire, the premises which he then held as tenant to them, or some one of them." Signed by the churchwardens and overseers of the parish of *Sudborne*, (who had usually received the rents,) and by *David Whayman*, *John Hunt*, and *William Read*, trustees of the said land. The Defendant had entered into the ordinary consent rule, confessing ouster, as well as lease and entry. The Plaintiff also relied on the circumstance, of which he gave evidence, that the land was worth more rent than at present was given; whence he inferred, that

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that it was for the benefit of all the joint-tenants to determine the tenancy, that they might let the land at a higher rent; and he contended that a joint-tenant can bind his companion by an act beneficial to him.

For the Defendant it was objected, that one of the joint lessors, *George Beedon*, had not signed the notice to quit: his name was used in the declaration; it was also proved that he had given notice to his co-lessors, that he disapproved of the ejectment, and of the notice to quit. For the Plaintiff it was answered, that there being separate demises, the notice and declaration were good, if not for the whole of the land, at least for the separate shares and interests of those trustees who had signed the notice. The jury, however, under the direction of *Grose* J., who reserved the point, found a verdict for the Defendant.

Shepherd Serjt. having in *Easter* term obtained a rule *nisi* to set aside the verdict and have a new trial,

Sellon Serjt. in this term shewed cause. The question cannot arise in this case, how far one joint-tenant may be bound by the beneficial act of his companion, done without his privity; for he expressly dissented from that act. In the case of *Right, on the Demise of Fisher and Others*, v. *Cuthell*, 5 *East*, 491. it was held by Lord *Ellenborough* C. J. and *Lawrence* J., that even the ratification by a joint-tenant, of a notice to quit given by his companions, would not make it good; for that the notice must be such an one, on which the tenant can rely and act with certainty at the moment of receiving it. The tenant could not act upon this notice given by three only.

Shepherd, *contrà*, distinguished this case from *Right* v. *Cuthell*, by observing that there the express terms of the condition required the concurrence of all the executors. Here, if there were no count but on the joint demise of the four, there might be some colour for the objection; but there are separate demises by each of them, and joint-tenants may demise their shares severally. *Litt*-

*I 5 f. 189.

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f. 189. If so, the notice of each will determine the share of each.

The Court (*a*) at first inclined to lay much stress upon the inconvenience that would ensue to the tenant, if, out of four joint lessors, a part were to give him notice to quit at such a time as to deprive him of the opportunity of giving notice to the residue of his lessors of his intention to quit the whole at the same time. In that case he might be compelled to become for the next year joint-tenant with some of his lessors; therefore this contract must be considered as made by the tenant on the one part with four lessors on the other part, who must all unite to determine the contract. But they afterwards desired that the matter might be further spoken to. Accordingly the point was again spoken to by *Sellon* and *Shepherd*, and the Court having taken time to consider,

Mansfield C. J. now delivered their judgment.

There was in this case a verdict for the Defendant, because the notice was supposed to be not sufficient, being signed by three instead of four. The lessors are joint-tenants: the question is, whether they or any of them have a right to recover any or what part of the premises? It is necessary to inquire what estate they had, and what powers belong to it. As joint-tenants, each had a right to demise his share. It would follow, that each had a right to put an end to that demise. It cannot depend on another, when that demise shall end. *Littl. sect.* 288. *Lord Coke's Commentary*, 186. *a*. To divers purposes each hath but a right to a moiety, as to enfeoff, give, or demise; and where all join in a feoffment, every of them, in judgment of law, gives but his part. If both make a feoffment in fee upon condition, and that for breach thereof, one of them shall enter into the whole, yet he shall enter but into a moiety, because

(*a*) *Chambre* J. was absent this day owing to indisposition.

that

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that no more in judgment of law passed from him. This shews that although the title, as well as the estate, be undivided, yet each hath so much as his portion is; and when they all join in a feoffment, each conveys only his part. So, if all join in a demise in law, it is the demise by each of his portion. If so, and if each demises only his own share, it cannot be said, that he cannot put an end to that demise, whether his companion join with him or not. Therefore the lessors of the Plaintiff have a right to recover three parts.

Sellon then moved that the rule might be amended by striking out the confession of ouster, as this decision left his client tenant in common of the other fourth part.

LAWRENCE J. You are contending the rest have no right to enter at all. Is not that an actual ouster? But if you can make any thing of it, you had better apply to a judge at chambers.

Rule absolute for a new trial.

WILLIAMS v. BURGESS.

July 7.

Notice of action against a custom-house officer for breaking the Plaintiff's dwelling-house in *C. street*, in the parish of *G.* is not a sufficient notice of the Plaintiff's place of abode, within the stat. 23 *G.* 3. *c.* 70. *s.* 30. and 24 *G.* 3. *sess.* 2. *c.* 47. *s.* 35.

In a penal action, if a parish is styled by its popular and well-known name, it is well enough, though that is not the name of consecration.

TRESPASS against the Defendant, a custom-house officer, for breaking and entering the Plaintiff's dwelling house: upon the trial, at the *Westminster* sittings after *Easter* term 1810, before *Lawrence* J., it appeared that the Defendant entered to search for run goods, but found none: after staying about 15 minutes

(without

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(without doing any damage) he went away. The statute 24 *G.* 3. *seff.* 2. *c.* 47. *f.* 35. extends to officers of the customs all the protections given to officers of the excise by stat. 23 *G.* 3. *c.* 70. *f.* 30., which enacts, that no writ shall be sued out against such officer for any thing done in the execution of his office, until one calendar month after notice in writing, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person who is to bring such action, and the name and place of abode of the Plaintiff's attorney or agent. And by *f.* 32. no Plaintiff shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice. In this case the notice produced was dated on the 29th of *December*, and expressed the Plaintiff's intention to sue, because the Defendant had, on the 22d of *November*, broken open the dwelling-house and warehouse of *Thomas Williams*, in *Cable-street*, in the parish of *St. George's* in the *East*, without otherwise stating the place of abode of the Plaintiff. *Shepherd* Serjt., for the Defendant, contended that this notice was insufficient, on two grounds; first, because the Plaintiff's place of abode was not explicitly expressed; secondly, because the cause of action to be proved, consistently with this notice, must be an act done in the parish of *St. George's* in the *East*; and there is no such parish in existence. *Best* Serjt., *contrà.* 1. The dwelling-house of the Defendant is his place of abode. This is an explicit statement that he dwells there. 2. " In an action of debt on a penal statute, 3 *H.* 8. *c.* 11. *f.* 2. against Dr. *Leigh*, for practising physic in the parish of *St. George's* in the *East*, within seven miles of the city of *London*, the act of consecration being produced, it appeared that the name of the parish was *St. George's* in the county of *Middlesex*; and *Lee* C. J. held it was well enough, for it was more generally known by the name of *St. George's* in the

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the *East*, than by the name of *St. George's* in the county of *Middlesex*." [*Lawrence* J. It can only be collected from the notice, and that but by inference, that the Defendant's place of abode was in *Cable-street* on the 22d of *November*, when the cause of action arose, but the intent of the notice is, that the Defendant may know where to find the Plaintiff, in order to tender him amends, on the receipt of the notice; and how does it appear that the Plaintiff continued to reside there on the 29th of *December*, when the notice was given?] As to the other point, he thought the name of the parish was stated with sufficient correctness, as it could not mislead. He permitted the cause to proceed, reserving the first point; subject to which, the jury found a verdict for the Plaintiff.

Shepherd having in this term obtained a rule *nisi* to enter a verdict for the Defendant in pursuance of the statute,

Best and *Frere*, Serjts., shewed cause.

MANSFIELD C. J. A man may have two houses; but the notice must be served at that which is his place of abode.

The rest of the Court concurring,

Rule absolute.

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July 9.

BRIDGES *v.* BERRY.

The Defendant, being unable to pay a bill when due, which he had accepted, obtained time, and indorfed to the Plaintiff as a fecurity a bill drawn by himfelf to his own order, which, when due, was difhonoured by the drawee, but the holder omitted to give the Defendant notice: held that by this laches the Defendant was not only difcharged as indorfer of the one bill, but alfo as acceptor of the other.

THIS action was brought upon two bills of exchange; one for 117*l.* 11*s.* 2*d.*, drawn on the 26th of *October* 1809, by the Defendant, at two months date, upon one *Ivory*; payable to his own order: the other for 119*l.*, drawn on the 17th *July* 1809, at three months date, by one *Box*, upon the Defendant, and accepted by him. At the trial of this caufe, at the *Middlefex* fittings in the prefent term, before *Mansfield* C. J., it appeared, that a few days after the bill accepted by the Defendant had become due, the Plaintiff applied to him for payment, and that the Defendant, confeffing his inability then to pay, requefted further time, and indorfed to the Plaintiff, and lodged in his hands, the bill for 117*l.* 11*s.* 2*d.* as a fecurity; and paid him in cafh the difference, with the intereft and cofts of the former bill. When this bill for 117*l.* 11*s.* 2*d.* became due, it was not paid by the acceptor; but no notice of the non-payment was given to the Defendant, the drawer of that bill. It was admitted on the part of the Plaintiff, that the Defendant was difcharged from the latter bill; but it was infifted that he continued liable on the firft bill for 119*l.* On the part of the Defendant it was contended, that he was alfo difcharged from his liability to pay that bill; and the Judge being of that opinion, nonfuited the Plaintiff, giving leave to his counfel to move to fet afide the nonfuit.

Vaughan Serjt. now moved for a rule to fhew caufe why the nonfuit fhould not be fet afide, and a verdict entered for the Plaintiff for 119*l.* He contended, that although the Plaintiff, by not giving notice of the non-payment by the acceptor of the bill for 117*l.* 11*s.* 2*d.*, had loft his remedy thereon againft the Defendant, ftill

 that

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that circumstance did not preclude him from suing him upon the first bill; and he cited the case of *Warrington* v. *Furbor*, 8 *East*, 242., where it was held, that in an action by a guarantee for money paid on account of one who had bought goods, and who, having accepted a bill for the price, had failed to pay it when due; the guarantee was not obliged to give evidence of any demand of payment made on the Defendant as acceptor of the bill. But the Court held that the case cited did not apply. Here the Defendant had first given a bill, on which he was liable as acceptor; and then, for a security, he had delivered to the Plaintiff a bill, on which the Defendant himself had a right to sue other persons; the Plaintiff, by not giving him due notice of the dishonour of the last mentioned bill, had put it out of his power to recover what was due thereupon; and having so done, he shall not be permitted to resort to the first bill.

Shepherd Serjt. for the Defendant.

Rule refused.

HINCKLEY *v.* WALTON.

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A ship cannot legally proceed without convoy from port to port to join convoy, unless a bond has been given that she shall not sail without convoy.

THIS was an action on a policy of assurance on goods, upon the ship *Providence*, at and from *London* to *Madeira*, at the rate of six guineas *per cent.*, to return 3*l. per cent.* for *East* or *West India* convoy and arrival, with liberty in that voyage to proceed and sail to, and to touch and stay at any ports and places whatsoever, particularly to seek, join, and exchange convoys, load

A ship licensed to sail without convoy, provided she is armed with a certain force, must take that force on board before she breaks ground.

A ship licensed to sail without convoy with a certain force, and clearing out without giving bond to sail with convoy, and without having the force required, cannot legally go round from her port of clearance to a port of convoy.

and

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and unload goods, without being deemed a deviation. A licence had been obtained, on the 12th of *January*, from the Admiralty, for the ſhip *Providence*, of *London*, *Smith*, maſter, burden 100 tons, armed with ſix carriage guns and manned with 12 men and boys, to ſail from *London* without convoy, provided ſhe ſhould be armed and manned in the manner above mentioned. She had her full complement on board in the port of *London*, but diſcharged five men; and on the 5th of *October* cleared out for *Madeira*, and ſailed from the *Downs* on the 11th *February* for *Portſmouth*, where, if any where, ſhe would have found and joined convoy. On the 13th ſhe was captured, off *Shoreham*, in the courſe of that voyage, having then on board only ſeven men. It appeared, that in all caſes when application is made at the cuſtom-houſe for the clearance of a ſhip, it is aſked by the officer there, whether or not ſhe is to ſail with convoy; and that no clearance is made out for any ſhip that is to ſail with convoy, unleſs a bond is given as required by ſtat. 47 *G.* 3. *c.* 57. *ſ.* 5.: and further, that when the *Providence* obtained her clearance at the cuſtom-houſe, no bond was given; from whence it was inferred by the Defendant, that it muſt there have been declared that ſhe was not to ſail with convoy. It was proved on the part of the inſurers, that at the time of the clearance of the ſhip from *London*, although they had obtained a licence to ſail without convoy, they had not finally determined whether or not they ſhould avail themſelves of it: but that they had reſolved, if, upon their arrival at *Portſmouth*, they found a convoy ready to ſail, to put themſelves under the protection of it: if, on the other hand, no convoy was ready, they intended to avail themſelves of their licence, and to complete their crew to the full complement thereby required. A queſtion being put to the jury, as to this part of the caſe, whether or not, when the Plaintiffs ſailed from the port of *London*, they

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they had determined to fail without convoy, the jury found, that they had not fo determined. A verdict was taken for the Plaintiff: and, in the laft term, *Shepherd* Serjt. moved to enter a nonfuit, on the ground of the voyage being illegal; becaufe neither had any bond been given for failing with convoy, as is required by the convoy act, 43 *G.* 3. *c.* 57. *f.* 5., nor was the licence of any avail, its conditions not having been complied with. As this cafe turned altogether upon the conftruction of that ftatute, it is neceffary briefly to ftate the provifions thereof, as far as they relate to the prefent fubject. By *f.* 1 & 2. all fhips belonging to the king's fubjects are forbidden, (except as thereinafter provided,) to fail without convoy, and to feparate therefrom without leave. By *f.* 3. a penalty of 1000*l.* is impofed on the mafter of any fhip who fhall fail without convoy, or fhall feparate without leave; and 1500*l.* if the fhip be laden with naval or military ftores; with a power, however, to the Court to mitigate the penalties to any fum not lefs than 50*l.* By *f.* 4. in cafe of a fhip failing without convoy, or feparating, the policy of affurance is made void with refpect to the property of the perfons who have the charge of the fhip, or of any perfon interefted in the fhip or cargo, who fhall have directed, or have been privy or inftrumental to the failing or feparating; and a penalty of 200*l.* is impofed for fettling or paying loffes upon fuch policies. By *f.* 5. it is enacted, that it fhall not be lawful for any officer of the cuftoms to fuffer any veffel to be cleared outwards from any port in the kingdom, until the perfon having charge of the veffel, fhall have given bond, with one furety, in the penalty of the value of the fhip, conditioned not to fail or depart without convoy, contrary to the directions of that act, nor to feparate without leave. *Sect.* 6. contains the exceptions from the operations of the above-mentioned claufes; among which it is fpecified, that nothing in that act

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contained, by which ſhips or veſſels are required not to ſail or depart without convoy, ſhall extend to any ſhip or veſſel for which a licence ſhall be granted to ſail or depart without convoy, either by the Lord High Admiral of *Great Britain*, or by the commiſſioners for executing the office of Lord High Admiral, for the time being, or any three or more of them, for that purpoſe; or to any ſhip or veſſel proceeding with due diligence to join convoy, from the port or place at which the ſame ſhall be cleared outward, in caſe ſuch convoy ſhall be appointed to ſail from ſome other port or place; except, nevertheleſs, as to the bond thereby required to be taken upon the clearance outward of ſuch ſhip or veſſel.

Beſt and *Pell* Serjts. now ſhewed cauſe. The queſtion is, whether this ſhip, under all the circumſtances of the caſe, can be ſaid to have ſailed without convoy: ſhe was ſailing from a port where no convoy was provided, towards a port where it was probable ſhe would find it. Till ſhe had arrived there, it could not be known whether ſhe would ſail without convoy or not. Therefore the penalties of the ſtatute could not attach till ſhe had reached that port; and what her intent was before her arrival there is not material; but if it were, the jury have expreſsly found that ſhe had not determined to ſail without convoy; therefore the Court cannot now infer, contrary to this finding, that ſuch was her intent. [*Lawrence* J. I think this queſtion does not turn on the intent of the party. There are certain caſes excepted from the general proviſions of the act; one of them is, the caſe of ſailing from the port of clearance in order to join a convoy. But to bring the caſe within this exception, there muſt be a bond given; and if there be no bond, the caſe falls within the general operation of the firſt ſection, which prohibits all voyages without convoy: then the voyage becomes illegal; and the policy is void upon

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upon the general principle, being made to protect a voyage forbidden by the law of the country.] It may be admitted that a bond ought to have been given, at the time of her clearance outwards in the port of *London*; and perhaps her owner or master might be liable to answer penally for obtaining a clearance without giving the bond; or the officer, for thus suffering her so to be cleared: but this omission will not vacate the policy. The policy is vacated only by finally departing from the kingdom without convoy, and the period of the final departure of this ship had not arrived. The 6th section of the act proves this still more strongly. The case of a ship sailing from her port of clearance to the port where she may find convoy, is expressly mentioned as a case excepted from the antecedent regulations, except only in respect to the bond. There is nothing illegal, or improper, in the Plaintiff's delaying finally to determine whether or not they should sail with convoy, until their arrival at the port of rendezvous; they were not obliged to make their election sooner; and had still their option to make use of their licence, in case the convoy was not ready; and if they had in fact sailed from the place of rendezvous with convoy, and had the ship been lost, while under its protection, the underwriters would have been liable within the terms of the policy, although in fact no bond had been given.

Shepherd and *Vaughan*, Serjts. *contrà*, were stopped by the Court.

MANSFIELD C. J. The Plaintiffs in this case contend that the circumstance of not giving a bond, as required by the statute, does not vacate the policy. But the question is not, whether the policy is void for want of a bond; it is, whether the voyage is not illegal, as being in contravention of this statute, the ship having

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failed without convoy, and under a licence, the terms of which were not complied with? It is plain that they meant to fail with a licence: they procure a licence to fail, with certain conditions annexed. It is equally plain that at the cuftom-houfe they muft have declared their intention to fail without convoy, for it is proved that, otherwife, they could not have obtained their clearance without giving a bond. Then it appears, that they have not decided whether they fhould ultimately avail themfelves of the licence, or fail with a convoy. But I think, that the fixth fection, which directs the bond to be taken in cafes where the fhip is to fail from her port of clearance to her port of rendezvous, (and this voyage fhe may legally perform without a convoy,) fhews that the owner is bound to decide, before he leaves the port of clearance, whether he will fail with convoy or not; for they are obliged to give the bond, and the condition of it is abfolute, that they will fail with convoy. Otherwife, in fuch cafes, no bond would ever be given; for the owner might always put off his final determination, or keep it in his own breaft, till his arrival at the place of rendezvous, where it might not be poffible to give the bond, and then he would be bound by no obligation either to fail with convoy, or to continue under its protection after he had failed.[a]

HEATH J. was of the fame opinion. It was impoffible to fay that the owner of the fhip had the option contended for in this cafe. This would be virtually to repeal the act of parliament, and to provide an expedient that would be taken advantage of in all cafes.

LAWRENCE J. was of the fame opinion.

Rule abfolute to enter a nonfuit.

(a) *Chambre* J. was abfent, on account of indifpofition.

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VOWLES *v.* MILLER.

July 9.

If a perfon has a field fenced with a bank and ditch, it is not a neceffary confequence that his ditch extends to the width of eight feet from the interior line of the foot of the bank, *i. e.* four for the bafe of the bank, and four feet for the ditch.

Proof of the ancient width of the ditch is evidence that the owner's land did not extend beyond the outer edge thereof.

And he has no right to cut away his neighbour's land for the purpofe of widening the ditch.

In cafe, an averment that the Plaintiff's clofe, at the time of the injury, was, and ftill was, in the occupation of *J. V.* and *H. V.*, is fufficiently proved, if at the time of the injury it was in their occupation, though the tenant be fince changed, before action brought.

THIS was an action upon the cafe brought by the tenant in fee of a clofe, againft the tenant for years of the adjoining clofe for an injury to the Plaintiff's reverfion. The declaration ftated, that the Plaintiff on, &c., was, and continually from thence hitherto had been, and ftill was, feifed in his demefne as of fee of and in a certain clofe called the *Ham* clofe, with the appurtenances, fituate, &c.; which faid clofe with the appurtenances, at the time of committing the grievance hereinafter mentioned, was, and from thence hitherto had been, *and ftill was in* the poffeffion and occupation of one *James Vowles*, and of one *Henry Vowles*, as tenants thereof to the Plaintiff. Upon the trial of this caufe at the *Taunton* Spring Affizes 1810, before *Graham* B., it appeared that at the time of the injury the clofe was in the poffeffion of *James* and *Henry Vowles*: but at the time of the action being brought it was in the poffeffion of *James* only. The Plaintiff's proof was, that the Defendant had a clofe contiguous to a certain clofe of the Plaintiff's, and furrounded by a fence which the Defendant was bound to keep in repair, confifting of a bank and ditch, and in fcouring his ditch the Defendant had dug it fo wide as to cut into the Plaintiff's foil: the Defendant directed his evidence to prove that this fence had immemorially been a bank with a ditch on the outfide of it, and not a bank only, and he contended that confequently he was entitled at common law to have a width of eight feet, as the reafonable width for the bafe of his bank and the area of his ditch together, which width, meafured from the interior line of the bafe

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of his bank, he proved that he had not exceeded; admitting, that if the fence were a bank only, he was entitled only to four feet. The Plaintiff, on the other hand, contended, that whether the Defendant's fence were a bank only, or a bank and ditch, the action well lay; for he proved that the ditch was cut by the Defendant's exprefs direction into the hard unmoved virgin foil of the Plaintiff's clofe; fo that the ditch was made wider than ever it was before. The jury found a verdict for the Defendant.

Lens Serjt. in *Eafter* term 1810, moved for a new trial on the part of the Plaintiff; upon the ground that the verdict was againft evidence. [*Lawrence* J. The rule about ditching is this. No man, making a ditch, can cut into his neighbour's foil, but ufually he cuts it to the very extremity of his own land: he is of courfe bound to throw the foil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on the top of it: therefore if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trefpaffer; no rule about four feet, and eight feet, has any thing to do with it. He may cut the ditch as much wider as he will, if he enlarges it into his own land.] The Court granted a rule *nifi*.

Pell Serjt. in the prefent term fhewed caufe; and upon the report of the merits of the cafe, the Court was of opinion in his favour, and difcharged the rule; it appearing that the declaration did not apply to the clofe to which the above-mentioned injury was proved to be done, but to a different clofe. He alfo objected that the Plaintiff fhould have been nonfuited at the trial for the variance. [*Mansfield* C. J. In an action by the reverfioner, it was fufficient to ftate in whofe occupation the premifes were

at

at the time of the injury. It is quite immaterial who occupied them when the action was brought. *Heath* J. was of the same opinion.] It would have been immaterial: but he has made it material by averring it. [*Mansfield* C. J. How did it affect the merits of the case? There have been decisions both ways. It is now settled that an immaterial allegation need not be proved. So, in trespass, the question is, whose was the close when the trespass was committed? *Lawrence* J. There is a difference between this case and the case of a trespass. In trespass every part is descriptive, and you must prove it all.] *Purcell* v. *Macnamara*, 9 *East*, 160. 12 *Vin. page* 68. *pl.* 44. S. C. 2 *Rol. Ab.* 677. *Regina* v. *Cranage*, 1 *Salk.* 385. It is an entire description and cannot be severed. 1 *Camp.* 320. *Martin* v. *Goble*. But the action was not brought for the injury to the close that was proved in evidence, but for an injury to a different close.

Lens Serjt. *contrà*. This is different from a trespass where every part is descriptive and must be proved. This is not a part of the description which materially affects the merits of the case. It might be material to ascertain in whose occupation were the premises at the time of the injury committed, but no further. It does not signify who had it when the action was brought; that could not be taken advantage of at the trial. The cases cited do not apply: that from *Campbell* is nearest, but it turns on a different point. There the Plaintiff described as his tenants, those who could not possibly be his tenants. He made the tenancy part of the description. It was a material fact. There must be some identity of the premises. Here the close was, at the time of the injury, in the enjoyment of the very persons named. This is not like the strictness required in contracts.

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tracts. It is not like the case of words spoken, where the speaking is made local by the declaration. If you give locality to the words, you must prove it. The case of *Regina* v. *Cranage* was an indictment for a riot and a local trespass. Perhaps there might have been more color for the argument if the occupier had been only one person. 12 *Vin.* 68. still less applicable. Abuttals set out must be proved, otherwise it is not a trespass in that close, but in another. [*Mansfield* C. J. A nonsuit for calling *St. Luke's, Chelsea, Chelsea* only, was corrected. It is now held to be sufficient to use the name of a parish commonly used (*a*).] That was a case of use and occupation. *Purcell* v. *Macnamara* was a case for a malicious prosecution. The variance was in the writ; the style of the Court.

MANSFIELD C. J. You must support your declaration by proving that when the injury was committed, the close was in the occupation of the persons named in the declaration, and then you have done enough. It is not necessary however to decide this point, as we think the verdict ought not to be disturbed.

Rule discharged.

(*a*) See *Kirkland* v. *Pounsett*, *ante*, 1. 570. *Williams* v. *Burgess*, *ante*, 3. p. 127. *acc.*

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BEAUCHAMP *v.* TOMKINS and SCHRADER.

July 7.

The Court of Common Pleas will reverse an outlawry upon motion, on error in fact sworn to. *Semble* that bankruptcy and certificate is no ground of discharge of a prisoner in custody on an *utlagatum capias*.

THE Defendant, *Tomkins*, was arrested in *October* 1805, at the suit of *Freebairn*. On the 19th of *November*, in the same year, he surrendered in discharge of his bail to that action, and to another at the suit of *Benj. Bishop*, nad had ever since continued in custody. In 1806 he was brought up by *habeas corpus*, and charged with a writ of *capias utlagatum* at the suit of the Plaintiff in this cause for a debt of 30*l.* 10*s.* The writ of exigent in this suit was tested the 6th of *November* 1805. In 1808, a several commission of bankrupt issued against him, and he had since obtained his certificate.

Shepherd Serjt. had in the last term obtained a rule *nisi* that the Defendant *Tomkins* might appear by attorney to reverse the outlawry, undertaking to appear and file common bail, and receive a declaration in any new action which the Plaintiff might think fit to commence, and that thereupon he might be discharged out of custody.

The case was four times discussed in the same term; *Best* Serjt. shewed cause. He contended, first, that the statute 4 & 5 *W.* 3. *c.* 18. *s.* 4. extended only to outlawries in the Court of King's Bench; and that neither that, nor any other court in *Westminster-hall* had, before the statute, power to reverse outlawries on motion. The Defendant was now liable to perpetual imprisonment under a criminal, not a civil proceeding; to which his certificate would be no bar; his goods, chattels, and lands were become the property of the crown, not of his assignees, and his only mode of relief was to obtain a pardon from the crown, which would only be granted

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upon the condition of his doing juſtice and paying his debts. That ſtatute never meant to give even the Court of King's Bench the power of the crown to pardon outlawry upon motion; it only gave them the power of diſcharging upon motion in caſes where they might before reverſe the outlawry on error brought. But they could not reverſe an outlawry, except upon ſome error aſſigned, which actually ſubſiſted on the record, unleſs it were for irregularity. In the caſe of *Aſhwell* v. *Stockwell*, *Barnes*, 324. the Defendants came to the Court to ſet aſide the outlawry for irregularity, which is evident from their praying that the Plaintiff might pay the coſts: in fact the Defendant was beyond the ſeas; but unleſs the judgment had been irregular, this Court could not have relieved againſt it on motion. Where the Defendant is properly outlawed, as it is admitted that here he is, the Court cannot, without the conſent of the crown, take out of the crown the chattels and lands which their judgment has inveſted in it. [*Mansfield* C. J. According to this argument the Court of King's Bench ought never to reverſe an outlawry without giving notice to the Attorney-General, and hearing him on behalf of the crown, which is never done. *Lawrence* J. The Court of King's Bench continually reverſes outlawry on motion. *Buller* J. uſed to aſk, "What is your error?" And if counſel aſſigned error in fact, as ſometimes they did, he would ſay, "that will not do; it muſt be error in law;" but when error in law is aſſigned, the Court never look into the record to ſee if the error exiſts there or not.] Thoſe caſes where, after error in law aſſigned, the outlawry has been reverſed without examination of the record, to ſee if the error exiſted, have only been ſuch wherein no one was intereſted to ſhew the failer of the record; but where there is an intereſt in continuing the outlawry, the Court cannot reverſe it but for error actually ſubſiſting; and if they did, and if any one who had

had an intereſt in diſputing the legality of a judgment ſo given, ſhould carry it to the next ſuperior court, it is impoſſible that ſuch a judgment ſhould ſtand.

Shepherd, *contrà*. If this be law, an outlaw in the Defendant's circumſtances can never reverſe the outlawry at all, unleſs by error, which is unreaſonable; for in that proceeding he muſt give bail to pay the debt, notwithſtanding he is diſcharged by his certificate. But before the ſtatute of *W*. 3. an outlaw might appear in perſon in any court, and reverſe the outlawry upon motion. [*Mansfield* C. J. and *Heath* J. It is a judgment, and how can a judgment be reverſed otherwiſe than by a writ of error?] If before that ſtatute he could not reverſe an outlawry otherwiſe than by error, that ſtatute would not help him. This Court has exerciſed, and does exerciſe, a power of reverſing outlawry on motion. In *Barnes*, 319. *&* *ſeq*. are ſeveral caſes to that effect. The conteſt in none of them is, whether the Court has title to proceed to reverſe the outlawry on motion, but only as to the terms on which it ſhall be reverſed. *Aſhley* v. *Stockwell*, it is true, was not the caſe of a bailable writ, but inaſmuch as this Defendant is a certificated bankrupt, the Court will deal with him as if he had been ſuch when he was arreſted, and then the circumſtance of the bailable writ makes no difference. If the Court do not in this caſe exerciſe, in favour of the bankrupt, the diſcretion which they undoubtedly poſſeſs, they will make a *capias utlagatum* in meſne proceſs preſs harder on a certificated bankrupt than a *capias utlagatum* in execution. *Rex* v. *Caſtleman*, 4 *Burr*. 2119. 2127. the Court thought an outlaw relievable within an inſolvent act. *Hely* v. *Hewſon*, *Barnes*, 321. there was no error at all on the record, yet the Court reverſed it on motion, on the ground that the outlaw was a priſoner pending the writ of exigent. [*Lawrence* J. The Court there pro-

ceeded

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ceeded on the ground that their procefs was abufed; for the Defendant was in the country, and by due diligence might have been found. *Mansfield* C. J. You have not examined what was the practice in the Court of King's Bench previous to the ftatute of *W.* 3. The title feems to imply that the Court were in the habit of reverfing outlawries; for it is "for the more eafy and fpeedy reverfing of outlawries in the fame court;" and the whole of the 4th fection feems ftrongly to indicate the fame practice. *Chambre* J. Why do you fuppofe the ftatute of *W.* 3. is confined to the Court of King's Bench, where actions by original were few in comparifon of the number in this Court, where they are much more numerous? The ftatute indeed has the words "faid court;" but I cannot fee on what foundation it fhould be fo enacted. *Lawrence* J. It feems by the cafe of *Symmons* v. *Bingoe and Cook*, 1 *Salk.* 498., as if the practice was to reverfe outlawries on motion in perfon before the ftatute.]

On a fubfequent day

MANSFIELD C. J. faid that the Court had been in the habit of reverfing outlawries on motion, but that fome error muft be mentioned. In 4 *Burr.* 2536. *Rex* v. *Wilkes*, fuch errors were allowed, that no outlawry can have been paffed for a century which might not have been reverfed for error. See if fome error cannot be found in this outlawry.

Shepherd Serjt. in this term abandoned his former rule, and on the authority of *Heely* v. *Hewfom* obtained a new rule *nifi*, that the outlawry might be reverfed upon the Defendant *Tomkins* entering a common appearance, and that he might be difcharged out of cuftody as to this action, upon the ground of error in fact, viz. that he was in prifon when the writ of exigent was running; which facts appeared by an additional affidavit.

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Best Serjt. now shewed cause. The writ of exigent is tested on the 6th of *November*, and the Defendant was not rendered in discharge of his bail until the 19th: he has also been before discharged under an insolvent act.

MANSFIELD C. J. The effect of that is; that the action will not proceed against his person, but against his effects only.

LAWRENCE J. The question is, whether he was in custody when the writ was sued out, not when it is tested. It is tested on the first day of the term, and probably, as usually is the case, on a day before it was sued out.

It appearing, on reference to the affidavits, that he was in custody, as well when the writ was sued out, as when it was tested, the Court made the

Rule absolute.

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WILSON *v.* SPILSBURY.

The Court set aside a *distringas* executed upon the goods of the wife of a surgeon in the navy, serving on a foreign station, the debt not being contracted in the wife's trade.

BEST Serjt. had obtained a rule *nisi* for setting aside the proceedings which had been had in this case, and for restoring to *Maria Spilsbury*, the Defendant's wife, the issues which had been levied upon the goods in her possession under a writ of *distringas*, with costs; upon an affidavit that the Defendant, at the time of commencing this action, was, and still continued, beyond seas, in his majesty's service as a surgeon in the navy, on a station at *Halifax*, in *Nova Scotia*; and where he was likely to remain for a long time: and that the deponent had not, nor had any person to her knowledge any authority to appear for him. That she knew nothing of any cause of action the Plaintiff had against the Defend-

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ant. That ſhe had not received any ſupport from the Defendant for nearly two years paſt.

Lens Serjt. ſhewed cauſe, upon the ground that the Plaintiff in this caſe had made the levy without knowing that the Defendant was abroad, and he relied on *Gurney* a. *Hardenburgh*, *ante*, 1. 487. In this caſe the Defendant's name ſtill remained affixed on a braſs plate on the door of the deponent's houſe, and ſhe daily ſold *Spilſbury*'s Antiſcorbutic Drops, bearing her huſband's ſignature on the label.

Beſt, in ſupport of this rule. It is not ſworn that the Plaintiff did not know the Defendant was out of the realm, which brings it within the caſe of *Greaves* v. *Stokes*, *ante*, 1. 485. This is not a debt contracted in trade, like the debt of *Hardenberg*.

Cur. adv. vult.

Mansfield C. J. now delivered the judgment of the Court. This was a motion to ſet aſide a *diſtringas*, and we think it ſhould be ſet aſide. There is no fraud in the caſe. The huſband was in the ſervice of his country. The woman has no other viſible ſupport. Her property muſt be taken away, unleſs ſhe appears and defends an action, of the merits of which ſhe knows nothing.

Rule abſolute without coſts.

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DOE, on the Demise of Sir ARTHUR CHICHESTER, Bart. v. OXENDEN.

July 11.

Where there is an estate sufficient to satisfy a devise according to one meaning of the description of the premises, collateral evidence is not admissible to shew that the testator meant to use the description in a more extensive sense.

Devise of "my estate of *Ashton*," the testator having a maternal estate comprehending a manor, and capital farm, and lands, in the parish of *Ashton*, as well as several other estates, some in the adjacent parishes, some ten and fifteen miles distant; evidence is not admissible to shew that he was accustomed to call all his maternal estate, his *Ashton* estate, to raise the inference that he meant to devise the whole by that name.

THIS was an ejectment brought by the lessor of the Plaintiff as heir at law of Sir *John Chichester* Bart. on a demise laid subsequent to Sir *John Chichester's* death; and at the trial before *Lawrence* J. at the *Exeter* Summer Assizes, 1809, a verdict was found for the Defendant, subject to the opinion of this Court on the following case. The lessor of the Plaintiff was heir at law of Sir *John Chichester* Bart., who on the 30th of *September* 1808 died seised in fee as well of the premises in question, which composed his maternal estate, as of other property, which he derived from his father, called the *Youlston* estate. The premises claimed consist of the manors of *Ashford*, *George Teign*, and *Stowford*, the tithes impropriate of the parish of *Nether Ex*, and two estates called *Great* and *Little Bowley*, in the parish of *Cadbury*, in the county of *Devon*: the manor of *Ashton* is situate in the parish of *Ashton*, with the exception of one insulated estate, parcel thereof, which lies in the parish of *Exminster*, adjoining to the parish of *Ashton*. The manor of *George Teign* is situate in *Ashton* parish: of the manor of *Stowford* one part lies in the parish of *Crediton*, and the other in the parish of *Sandford*; the manor itself being distant from the parish of *Ashton* about 12 or 13 miles. The parish of *Nether Ex* is also about 11 or 12 miles, and the parish of *Cadbury* 15 miles, distant from the parish of *Ashton*: with the premises aforesaid are comprised, besides the manor of *Ashton*, the Barton of *Ashton*, and lands lying within the parish of *Ashton*. On the 3d day of *September* 1808 Sir *John Chichester* Bart.,

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Bart., being seised as aforesaid, made and published his last will and testament, duly executed, so as to pass real estates, in the terms following: "I give my estate of "*Ashton*, in the county of *Devon*, to *George Chichester* "*Oxenden*, (the Defendant,) second son of Sir *Henry* "*Oxenden* Bart. of *Broom*, in the county of *Kent*. I give "the house in *Seymour Place*, for which I have given a "memorandum of agreement to purchase, and which is "to be paid for, out of timber which I have ordered to "be cut down, to the Rev. *John Sandford* of *Cherwill*, "in *Devonshire*." To shew that by the words "my estate of *Ashton*," the devisor intended to dispose of the whole of the maternal estate before specified, the following, amongst other evidence, was offered by the Defendant, and received. First, the verbal instructions given by the devisor, at the time of making the will, to the devisee *John Sandford*, who made the same, which were, to make a memorandum to guard against accidents, to give *George Oxenden* his, the devisor's, *Ashton* estate. Secondly, expressions which Mr. *Sandford* and the Rev. *Thomas Hole*, (the latter of whom had occasionally audited the devisor's accounts for 24 or 25 years previous to his decease,) had at various times heard the devisor use in describing his different property, *viz.* that in speaking of his paternal property, he used to call it his *Youlston* estate, and in describing his estate derived by him from his mother, he used to designate that by the general term of his *Ashton* estate, or *Ashton* property; and, particularly, on one occasion, directed that the timber should not be cut on his mother's property, the *Ashton estate*, but on his father's property. Thirdly, a series of annual accounts delivered to the devisor by *John Cleave*, and *John Smyth*, who were successively two of his stewards: these accounts commenced with the year 1785, and the form of each of them was very nearly the same. The following is a description of the form of one of these accounts;

accounts: on the outside was indorsed, "J. Cleave's "account for *Ashton* estate, from *January* 1st, 1799, to "*January* 1st, 1800;" the first page thereof was thus headed—"*J. Cleave's* account for Sir *John Chichester* "Bart., for *Ashton estate*, from *January* 1st, 1799, to "*January* 1st, 1800;" in the first page was contained a list of the various payments made by *Cleave*, among which was the following.—"Paid a year's annuity to *Broad Clist* poor, to *Christmas* 1799, 23*l.* 11*s.*: which parish of *Broad Clist* was wholly distinct from the premises sought to be recovered by this ejectment, but the annuity was charged on part of these premises. The 2d and 3d pages were entitled,—"Receipts of rack rents," and contained an account of the rents of the several premises sought to be recovered by this ejectment, (except the conventionary rents of three manors,) in separate sums, but added up at the end, into one general total. The 4th page contained a list of rents, intitled, conventionary rents of the manor of *Ashton*. The 5th page contained a list of two other sets of conventionary rents, the one intitled, "Conventionary rents of the manor of *George Teign*," and the other intitled, "Conventionary rents of the manor of *Stowford*." The last page of the account was intitled, "Account stated." And was as follows:

Account stated.

J. Cleave, Dr.

	£	s.	d.
To receipts of rack rent, as in pages 2 and 3 - - - -	1042	12	2½
To receipts of conventionary rents of *Ashton* manor - - -	18	15	2
To receipts of *George Teign* manor -	5	6	0
To receipt of *Stowford* manor - -	9	11	6
To balance of last account - -	102	2	6
	1178	7	4½

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J. Cleave, Cr.			
By payments, as in page 1.	708	7	0
By balance due from *J. Cleave*	470	0	4½
	£1178	7	4½

And underneath was the following receipt, the signature to which is in the hand-writing of the devisor.——*April* 1st, 1810,—Examined this account, and received the vouchers thereof, and due from *John Cleave* on the balance thereof, the sum of 470*l.* 0*s.* 4½*d.* *John Chichester.* The foregoing evidence was objected to by the counsel for the lessor of the Plaintiff, as inadmissible; but was received, subject to the opinion of the Court as to the propriety of its being admitted. If the Court should be of opinion that the evidence was properly received, then the verdict was to stand; if not, then a verdict was to be entered for the lessor of the Plaintiff, for so much of the premises, if any, as the Court should think did not pass under the will.

The case was twice argued, first in *Hilary* term 1810, by *Pell* Serjt. for the Plaintiff, and *Heywood* Serjt. for the Defendant; and again in *Easter* term by *Best* Serjt. for the Plaintiff, and *Lens* Serjt. for the Defendant.

For the Plaintiff it was argued, that parol or other extrinsic evidence was not admissible to contradict, explain, or enlarge the effect of a will; it was admissible only in cases where there was an absolute necessity, because the will would otherwise be uncertain or insensible, and could have no effect without it, or where there was a latent ambiguity; and no such necessity or latent ambiguity subsisted in this case. All that class of cases where parol evidence has been received to repel trusts arising on presumptions, may be laid aside as irrelevant; (to which the Court agreed.) The testator had an estate of *Ashton*, viz. a manor of *Ashton* and the barton of *Ashton*, and other lands there; and having an estate

of

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of *Ashton*, he used the most appropriate words to convey it. If he had said, the manor of *Ashton*, it would not have comprehended the Barton, nor if he had devised the Barton, would it have included the manor. His "estate of *Ashton*" was his estate "of or belonging to *Ashton*." The words do mean that, and they can mean nothing else. At that period of the cause at which the evidence was offered, it was in proof, therefore, that the testator had an estate of *Ashton*; and there being enough, both in interest, and quantity of estate, and position, to satisfy the terms of the devise, the evidence ought not to have been received, but the case ought to have stopped there, unless it had been shewn that there was another *Ashton* estate belonging to the devisor. To admit evidence to shew that other land, besides that which suffices to satisfy the devise, was intended to pass, is in direct opposition to the statute of frauds. [*Mansfield* C. J. This has nothing to do with the statute of wills, or with the statute of frauds: the question is, as has before been truly stated, whether evidence can be received to shew what the testator meant by these words; if there is a latent ambiguity, it is admissible; if there is none, it cannot; but still, if the evidence is admitted, the estate equally passes under a will in writing attested by three witnesses.] If it be admissible where there is estate enough to satisfy the devise, it would have the effect of so extending by parol proof the meaning of the will, as to pass other estates than those which the words of the will, taken alone, would pass. But never, not even at common law, could land pass by a will not in writing. [*Mansfield* C. J. That is too general a proposition: for at common law, land did not pass by devise at all, unless by the customs of particular manors; and such customs might perhaps so regulate the form of devise, as that it might pass by parol. But that is irrelevant to the present question.] The precautions which the law has thrown around wills, by prescribing certain formalities

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to be observed in their execution, are rendered useless, if it is open to the Court to put on the words of a devise any other meaning than the obvious and common meaning which those words import. Before, therefore, any evidence can be let in to explain the words, it must be shewn that without such explanation the will could bear no meaning at all, but would be void for uncertainty, and that it would be impossible to say what property was meant to be disposed of. In that case extrinsic evidence is admitted from necessity, as if the testator had had no estate of *Ashton*; but that is not so here. How can any man give an opinion upon the title to an estate, if he may not know by looking on the parchment or paper, what is the estate? if he is to hunt all over the country for circumstances *dehors* the deeds, it will shake half the titles in the kingdom. Here is something definite and certain to answer the devise, and there is nothing but conjecture to lead the Court to suppose that the testator meant any thing further than that which is plainly expressed. Therefore the lessor of the Plaintiff is entitled to recover only such part of the premises as lies within the parish of *Ashton*. In support of these arguments reference was made to the following authorities: 5 *Co. Rep.* 68. *Cheyney's* case. *Rose* v. *Bartlett*, *Cro. Car.* 292. *Ulrich* v. *Litchfield*, 2 *Atk.* 372. *Day* v. *Trig*, 1 *P. Wms.* 286. *Beaumont* v. *Fell*, 2 *P. Wms.* 140. *Brown* v. *Selwyn*, *Cas. Temp. Talb.* 240. *Lord Walpole* v. *Lord Cholmondeley*, 7 *T. R.* 148. *Whitbread* v. *May*, 2 *Bos. & Pull.* 593. *Doe, on Demise of Brown*, v. *Brown*, 11 *East*, 441. Upon the case of *Ulrich* v. *Litchfield*, in which Lord *Hardwicke*, Chancellor, said, "I do not know that upon "the construction of a will, courts of law or equity admit parol evidence, except in two cases: first, to ascertain the person, where there are two of the same "name; or else, where there has been a mistake in the "christian name or surname." [*Mansfield* J. remarked, that the rule here laid down was certainly too narrow; for

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for in case the testator had possessed no estate at *Ashton*, the rule would have excluded all evidence to shew what estate was meant. But from whatever cause the ambiguity proceeds, whether from a misdescription of the estate, or from a misdescription of the person, if there be a latent ambiguity, the parol evidence is admissible. In the case of *Lord Walpole* v. *Lord Cholmondeley*, there was neither a latent, nor a patent ambiguity: the testator, by reciting that by his last will and testament, dated the 25th of *November* 1752 he had devised his real estates, was held to republish that will.]

For the Defendant it was contended, that this was a case of latent ambiguity. A latent ambiguity cannot be discovered to exist, but by the aid of collateral evidence; and if that evidence be such as would, if admitted, raise a doubt in the mind of the Judge, it ought to be received, and left to the jury. No one can see on the face of this will any ambiguity whatever. The word "of" does not denote locality in this case: it means all that estate which the testator called *Ashton*. He might designate his whole estate by the name of any one parcel, whether distant or near, if he had any reason in his mind for so doing. The word "of" is therefore distinguishable from "at," the expression used in *Whitbread* v. *May*, which might denote locality; and the Court not being bound to construe "of" as local, may give it any other construction which the evidence requires: the ambiguity is therefore raised, and by the same evidence it has been explained. And the only question is, what the testator intended to give. The old rule of law is, that evidence cannot be given against the purport of a deed or record, but it may be given to shew what are the parcels, or who are the parties. The circumstance that at a place called *Ashton* there are three or four things bearing that name, as the parish, the manor, the Barton, and lands, is by no means conclusive against the Defendant; on the contrary, it renders it necessary that evidence

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should be admitted, to shew what and which of them are included in the devise. In the testator's own parish of *Cadbury* are two estates of *Great* and *Little Bowley*. If he had devised his estate at *Bowley*, parol evidence would have been admissible to shew what estate he meant. If a man has been used so to name certain property, that none of his family can misunderstand him, when he uses that name, he may well devise thereby. In the case of *Doe, on demise of Brown*, v. *Brown*, there was a long interval of time in which the testator might have recovered from his error, and therefore no room to say there was an ambiguity: here there is evidence to raise the ambiguity, for the testator uses the expression continually to the very time of making his will. Nothing on the face of the will confines the property devised within a narrower compass than the county of *Devon*. The general principle contended for is much too wide, that the Court can in no case go beyond the words of the will: the only question is, to ascertain in what cases they can go beyond those limits. And the rule applies equally to personal as real property, that parol evidence is not to be admitted to make that pass by writing which is not expressed by writing; yet, in many cases, collateral evidence has been admitted to shew what personal property the testator intended to designate. No case has been cited which directly applies to sustain the position, that where there is property on which the will, taken in its most obvious sense, can operate, the Court is incompetent to look further. There is no doubt upon the real intention of the testator in this case. He called all his paternal estate his *Youlstone* estate, and all his maternal estate his *Ashton* estate, denominating both the one and the other, not from the name of the family from which he derived it, but from the name of the principal places upon the estate. The whole question is, whether the law prohibits the Court from calling in the same aid to ascertain the meaning to be attributed to the name of an

estate, which it permits to ascertain the meaning of the name of a person. If the testator had used expressions of a definite legal meaning, parol evidence would not be admissible to shew that he annexed to them a different meaning; but when he uses words which are not technical, but of common parlance, the testator may annex to them whatever meaning he pleases. The following authorities were also referred to: *Bac. Max.* 23. *Wyndham* v. *Wyndham*, *And.* 58. *Dowsett* v. *Sweet*, *Ambl.* 175. *Godbolt* 16. *Doe, on Demise of Clement*, v. *Collings*, 2 *T. R.* 498. *Hinchcliffe* v. *Hinchcliffe*, 3 *Ves.* 516.; and *Pulteney* v. *Lord Darlington*, cited *ibid.* 529. *Doe, on Demise of Cook*, v. *Danvers*, 7 *East*, 299. *Trimmer* v. *Bayne*, 7 *Ves.* 518.

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In reply, it was urged, that Lord *Eldon* had much questioned the case of *Pulteney* v. *Lord Darlington* in the subsequent cases of *Pole* v. *Lord Somers*, 6 *Ves* 322. and *Druce* v. *Denison*, 6 *Ves.* 400. The case for the Defendant would have been much stronger, if the devisor had denominated the one estate his *Chudleigh* estate, from the name of his mother's family, and the other his *Chichester* estate, from the name of his father's family; for that is an usual mode of naming estates, and that would have been intelligible. [*Mansfield* C. J. There you are upon bad ground; for if the evidence can be received, it is plain enough in this case what the testator meant.] The testator having an estate at *Ashton*, another at *Stowford*, another at *Exminster*, desires his solicitor to frame a devise of his "*Ashton estate*." The solicitor does not however do that, but makes him devise his estate *of Ashton*, so that the evidence, when admitted, does not apply to this devise. The evidence is of no avail, unless it satisfies the ambiguity raised: and it is impossible to receive evidence of the meaning which the person who framed the will attached to certain words, and to prove that Mr. *Sandford* thought the "estate *of Ashton*" was synonymous

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nymous with the "*Ashton estate*," in order to shew what the devisor meant. But the intent must be collected from the words themselves. It is incumbent on the Defendant who contends for an exception to the general rules of law, to find authorities to support the doctrines he contends for, but in none of the cases cited has it happened, as here, that the testator has possessed a single estate which would satisfy the words of the devise.

Cur. adv. vult.

Mansfield C. J. now delivered the judgment of the Court. After recapitulating the case, and adverting to the evidence, he added; If this evidence ought not to be received, the consequence will be, that so much of the property only will pass, as is not affected by the evidence. I have doubted much upon it. The more, because in a less strong case, *May* v. *Whitbread*, two judges thought the evidence should be received. Lord *Eldon* increased my doubts. On the whole, I rather think we should go further in receiving this evidence, than any case has yet gone. There is an extreme jealousy in receiving evidence to explain written instruments. Many cases have been cited. In general they are well known. The last and strongest, was *Doe* v. *Brown*. There it was impossible to doubt what the testator meant. In this case my own judgment only is, if the evidence were admitted, that the testator meant to devise the whole of his maternal estate to his maternal relations, and not only the land locally situated at *Ashton*. But to decide in favour of this evidence would be going further than any Court has yet gone. I need not particularize the cases; of devises where there were two persons of the same name; where the name by which property was devised, applied equally to two estates. Such was the case in 1 *P. Wms.* of a devise to *Gertrude Yardley*, by the name of *Catherine Earnly*, where there was no such person as *Catherine Earnly*. The case in *Ambler* of legacies to *John*

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John and *Benedict*, sons of *John Sweet*, he had two sons, the name of one was *Benedict*, but the name of one was *James*. The evidence was received. It is not expressly said in any of these cases, that it was necessary to receive the evidence, in order to give effect to the will, which would not operate without such evidence. But although this is not said, yet the rule seems to hold. It will be found that the will would have had *no* operation, unless the evidence had been received. Here, without the evidence, the will has an effective operation; every thing will pass under it, that is in the manor or parish; or what he would naturally call his *Ashton* estate. This will be an effective operation; and this being so, the case herein differs from all the others; because in them, the evidence was admitted to explain that, which without such explanation could have had no operation. It is safer not to go beyond this line. Therefore only those premises pass which are in the manor or parish of *Ashton*, for all but them, the Plaintiff has a right to recover.

Postea to the Plaintiff.

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Where goods are sold, to be paid for by a bill of a certain date, the price shall bear interest from the day when the bill would have been due, and may be recovered as damages, on a special count for the non-delivery or non-payment of the bill. But if, in such a case, upon a general count for goods sold and delivered, the jury give the price and interest as damages, the Court will not therefore set aside the verdict.

THE declaration in this action consisted only of the general counts for goods sold and delivered, and the money counts. The action was brought to recover 1753*l.* 10*s.*, the price of 500 chests of oranges. 1465*l.* 2*s.* was paid into court. The Plaintiff, by a miscalculation in the rate of exchange, overcharged the Defendant 11*l.* 5*s.* 9*d.*, which was therefore to be deducted from

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the amount claimed, and 277*l.* 2*s.* 3*d.* would have completed the refidue of the price. They were to be paid for by a bill at 30 days, which the Plaintiff tendered to the Defendant for acceptance; and the Defendant, on account of an alleged inferiority in the quality of the goods, which he neverthelefs received, and of the overcharge in the rate of intereft, refufed to accept the bill. After the expiration of the 30 days from the date of the bill, the Plaintiff commenced this action. The jury found for the Plaintiff, and the Plaintiff entered the verdict for 460*l.* 8*s.* 11*d.*, confifting of 277*l.* 2*s.* 3*d.* for the refidue of the prime coft, and intereft upon the whole price, as well what was paid into court, as what was now recovered, computed from the day when the bill ought to have been given, to the time of the trial.

Lens Serjt. in *Eafter* term obtained a rule *nifi* to reduce the verdict to 277*l.* 2*s.* 3*d.*, the refidue of the invoice price: he averred that the verdict for intereft was taken by furprize and without his knowledge, the queftion not having been put to the jury. [*Lawrence* J. Is there not this diftinction, that if goods are fold without an agreed day of payment, the price fhall bear no intereft; but where payment is to be made on a day certain, does not the price bear intereft from that day?]

MANSFIELD C. J. In many trades there is a cuftom either to pay by cafh at a day certain, or by a bill of a certain time; and the Courts have faid, the buyer fhall not be in a better fituation by the breach of his contract.

Shepherd and *Beft* Serjts. in this term fhewed caufe. It is not neceffary to declare fpecially on the non-delivery of the bill, if the day is paft at which the bill would have become payable, and declaring after that day for the money, the price of the goods fold, the Plaintiff may

recover

recover interest from the time when the money became due, in the shape of damages. To decide otherwise would only tend to prolixity in pleading, by inducing Plaintiffs in all cases to add a count upon the special contract for the non-acceptance of the bill; if such a count had been here, it is clear the Plaintiff might have recovered interest in the shape of damages for the non-performance of that part of the contract: and it has been decided that the same may be done upon the count for goods sold and delivered. *Mountford* v. *Willes*, 2 *Bos. & Pull.* 337. [*Chambre* J. Such a count is sufficient in order to recover the price of the goods, but not to recover interest, without a count on the special contract. *Lawrence* J. Lord *Kenyon* C. J. tried at *Exeter* an action for money had and received against a sailor, who had taken and kept a public house, and who, when he was drunk, had confessed that he set up in trade with the contents of a purse he had found on the road; and which was proved to belong to the Plaintiff, and that the Defendant knew whose purse it was; and Lord *Kenyon* C. J. directed the jury to give interest at the rate of 5 *per cent.* from the time of his finding it. The case was never afterwards moved.] The Plaintiff has a right to his interest, in the nature of damages, in point of justice. If there were a written contract that goods should be paid for on a day certain, and that on default the price should bear interest from that day, the increased sum would still be only the price of the goods, and the paper would be evidence upon a count for goods sold and delivered, to entitle the Plaintiff to recover the whole. If a sale be made on similar terms, though not expressed in writing, the case is the same: and if corn be sold, to be paid for at the price of the next week's market, after the day is past, and the price ascertained, the seller need not declare on the special contract, but may generally declare for goods sold; because after that day the newly ascertained sum is the price: so here, goods

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goods being sold, to be paid for at a certain day by a bill, which if not delivered, or not paid, bears interest, after the days of delivery and payment elapsed, the contents of the bill and interest added constitute the price, and may be recovered as such upon a count for the price of the goods. A note or bill may on the face of it purport to bear interest or not: if it does, the interest is part of the contents of the note; if not, the law gives it as damages for the detention of the debt; but the Plaintiff does not in that case declare specially for the interest: it is sufficient that he declares on the instrument. [*Mansfield* C. J. In *Mountford and Willes*, the Court only decided that if the jury took on themselves to give interest by way of damages, the Court would not, on that account, set aside the verdict. *Heath* J. In truth, in the city the interest on goods is charged in the price; if you pay in ready money, the seller gives you discount. *Chambre* J. Generally speaking, every tradesman fixes a price, which enables him to wait an indefinite time, by way of indulgence; and he goes out of his way when he stipulates for a particular day of payment. We should be doing a very beneficial thing to the fashionable traders at the west end of the town, if we could enable them to charge five *per cent.* on all their bills. To be sure something is said in this case about a precise mode and time of payment, but the difficulty is, that fact has not been submitted to the jury. *Mansfield* C. J. The Defendant refused the bill tendered, because the exchange was calculated a halfpenny too high: but upon the evidence, if there had been a count for not delivering a bill, the jury would certainly have found that the Defendant had contracted to deliver a bill at that time.]

Lens and *Vaughan*, Serjts., in support of the rule. It has been held, that interest cannot be recovered upon goods sold generally, nor can a contract to allow it from a time

a time certain of payment be inferred. *Blaney* v. *Hendrick*, 3 *Wilf.* 205. *Trelawney* v. *Thomas*, 1 *H. Bl.* 303. *per Gould* J. Either *Mountford* v. *Wells* must be supposed to have been determined as a case upon a special contract, or it is over-ruled by the case of *Gordon* v. *Swan*, cited in the case of *De Bernales* v. *Fuller*, 2 *Camp. N. P. Rep.* 429. So *De Haviland* v. *Bowerbank*, 1 *Camp.* 51., and *Crockford* v. *Winter*, 1 *Camp.* 128. shew the opinion of the Judges in the King's Bench to be the same as to the count for money had and received. The like in *Tappenden* v. *Randall*, 2 *Bos. & Pull.* 472. *Moses* v. *Macfarlane*, 2 *Burr.* 1005. Interest is not the price of goods sold and delivered. This is not distinguishable from the common case of goods sold and delivered: that indeed is rather a stronger case; for where the goods are delivered at the time, the law raises a debt immediately.

MANSFIELD C. J. The first question is, where a person promises to give a bill, does the law imply an engagement, in case no bill is given, to pay interest as if the bill had been given; secondly, if this be so, can the Plaintiff take advantage of it to recover the interest in this form of pleading? I never could reconcile it to myself as reason, that any man who delays the payment of money which he owes, should not pay interest for it; but certainly that is not the law; nor, therefore, understand why interest should not be paid for goods sold and not paid for.

Cur. adv. vult.

The judgment of the Court was now delivered by

MANSFIELD C. J. This question arises upon a sale of goods, to be paid for by bills. There is no count for not giving the bills, only a count for goods sold and delivered. The action was brought after the time for the payment of the bills had expired. The interest was calculated from the time the bills would have become due.

 Such

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Such being the nature of the case, the question is, Whether the Defendant, who ought to have accepted bills which would have carried interest, shall be in a better situation by breaking his contract, than if he had performed it. We think the Defendant ought to pay interest. The application is to rectify a verdict which has given that interest. The merits being with the verdict, if there is no miscomputation, we will not alter it. The Plaintiff is entitled to receive as much as if the Defendant had accepted the bills, which would have carried interest.

Rule discharged.

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Where goods are shipped on an invoice, an average loss upon a policy must be calculated upon the invoice price, and not upon the price of the market at which the damaged goods are arrived.

The certificate of a *British* vice-consul at the *Brazils*, of the amount of the proceeds of damaged goods, which by the law of that country are compelled to be sold under his inspection, is not evidence.

THIS was an action brought to recover the loss sustained by the Plaintiff, by the deterioration of some kerseymeres on board the *Earl Percy*, insured by a policy subscribed by the Defendants, "at and from *London* to *Rio Janeiro*." The Plaintiff averred a loss by perils of the sea. The Defendant pleaded *non assumpsit*, and paid into Court 50*l. per cent.* Upon the trial at *Guildhall*, at the sittings in this term, before *Mansfield* C. J., the Plaintiff proved, that, if the goods had not been damaged, the market would have afforded a profit of 15*l. per cent.*; that the goods were damaged, apparently by sea-water, to a considerable degree; the witness would not have given 30*l. per cent.* for them; but the Plaintiff gave no other evidence of the manner in which the damage was occasioned. To prove the amount of the loss, a witness produced a certificate from the *British* vice-consul there, of the amount for which the goods were there sold, being 9*l.* 15*s. per cent.* only, of the sum insured; and the same witness swore, that, by the law of the *Brazils*, and other parts of *South America*, the vice-consul is constituted general agent for all absent owners of goods, and that

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that the same law authorizes and compels the vice-consul to make sale of all the damaged goods of all absentees, with the assistance of two *British* merchants as assessors. *Mansfield* C. J. admitted this evidence, although *Best* Serjt., for the Defendant, objected to it, but reserving to him liberty to move. *Best* also contended that, as the Plaintiff had given no evidence of any loss by perils of the sea, there was no proof of that allegation; in support of which proposition he cited *Rucker* v. *Palsgrave*, *ante*, i. 419.; for that the payment of money into Court did not admit any thing more than that the Defendant owed 50*l.* *per cent.* for some cause or other; but *Mansfield* C. J. held that it admitted that the loss was occasioned, as averred, by peril of the sea, and that the only thing in issue was the amount of the loss: and the jury, under his direction, found a verdict for the Plaintiff for 40*l.* 4*s.* damages, with liberty to move to reduce it to 20*l.*, the surplus of 70*l.* *per cent.*, after deducting the 50*l.* paid into court, if the Court should think the evidence was not admissible.

Best on a subsequent day moved for a new trial upon two grounds. First, that the certificate was not admissible evidence. Secondly, that although the Defendant admitted damage occasioned by perils of the sea to the amount of 50*l.* *per cent.*, he had gone no further, and that the Defendant, if he had not been prevented, would have given evidence at the trial, that other goods, sent by the same vessel, were in no respect damaged, from whence the jury might infer, that all the damage beyond the extent of 50*l.* *per cent.* was occasioned, not by perils of the sea, but by the improper stowage of the Plaintiffs: they had not in fact even proved that there had been a storm, or an hour's foul weather during the voyage. [*Mansfield* C. J. The payment of money into Court admits the storms. *Lawrence* and *Heath*, justices. No facts are laid before the Court, from which we can

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infer that the Defendant could put himself in a better situation if he had the advantage of a new trial.] The Court granted a rule *nisi* upon the admissibility of the evidence only.

Shepherd Serjt. shewed cause. He contended first, that there was a mistake in the verdict, which, instead of giving 70*l.* *per cent.* damages, should have given 85*l.* damages; for it was proved that the goods were damaged 70*l.* *per cent.* below the invoice price, and that if they had been uninjured, they would have yielded a profit of 15*l.* *per cent.*, and the loss was to be computed, not on the invoice price, but on the market price of the place at which they had arrived, so that if the disputed evidence were inadmissible, it would make a difference of 5*l.* *per cent.* only in the amount of the damages. But supposing the verdict to be now computed upon the right principle, the evidence was sufficient to entitle the Plaintiff to his verdict. This sale was compulsory; the vice-consul, as agent of the assured, could not do otherwise than sell the goods. The assured, acting for the benefit of the concern, could get at nothing more than the amount rendered by the vice-consul's account. The law put the sale into the hands of that officer. The loss, therefore, is what the owner sustains, taking this law, and the operation of it, into the account. He could get no more for the goods, therefore the loss is the difference between the sum received, and what the goods were worth when found. The Plaintiff's damage is to that extent. Suppose the law had been, that damaged goods should be burnt: although the sea should have only partially damaged them, yet the owner would have had a right to recover the whole value, if in consequence of that partial loss the law interfered and destroyed the whole. This is in the Plaintiff's favour, whether the paper be evidence or not, that they have received only the proceeds of the sale according to that account.

And

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And unless the contrary be shewn, it must be taken that they received no more. The Defendant should have shewn that we did or might have received more. In another point of view the evidence is admissible: the vice-consul at the *Brazils* may be considered as the agent of all concerned. If so, he is the agent for the underwriters; therefore his account would bind both parties.

MANSFIELD C. J. It was in like manner argued in a case here, *Heath* v. *Burgess* (a), upon the loss of a trinket which cost a very few pounds in the *East Indies*, that the Plaintiff was entitled to calculate the loss at an advance of 70*l.* or 80*l.* *per cent.*. I held that against a carrier, as an insurer, he could only calculate the value of his goods at the invoice price. The case of an insurance was fully agreed upon there.

LAWRENCE J. Surely it is understood, that when the goods are shipped upon an invoice, the loss is calculated upon that basis; when otherwise, recourse is had to the produce at the market.

MANSFIELD C. J. The only question is, whether this loss should not have been proved by ordinary evidence. They should have had somebody to attend at the sale, who might have been a witness.

Best Serjt. *contrà*. It does not appear that the law of the *Brazils* gives effect or authority to the certificate of the vice-consul. Custom-house officers are bound by law to attend clearances, &c. but their certificate does not prove any facts. It does not appear the vice-consul was sworn. There is no instance of such evidence being admitted. Judgments are pronounced in the presence of both parties.

(a) *C. B. Mich.* term 1809, and *Hil.* term 1810.

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MANSFIELD C. J. I thought at the trial it was very difficult to bring this within any head of evidence. It was somewhat analogous to the proceedings of courts and other public functionaries: but I know no instances of such as this being received. I dare say it would be evidence in any other country. It came nearest to the case of judgments in foreign courts. But we receive judgments under the seals of the courts. The vice-consul is no judicial officer. He acts under a wise regulation to prevent the improper disposition of damaged goods. They are put into warehouses appropriated to them by government. The vice-consul must preside at the auction. There is no rule in the *English* law which makes his certificate evidence. He has been supposed to be an agent, and he is, to some purposes. So is an auctioneer in this country; nevertheless his certificate is not evidence in a court of justice, but what was done at the auction must be proved. The business of the vice-consul is to see a fair sale. It is going much further to say that his certificate shall bind the parties. Any body present might have proved the facts. The chirograph of fines here proves itself, but the indorsement of the proclamation of the fine must be proved by a compared copy of the record.

Rule absolute to reduce the damages to 70*l.* *per cent.*

July 11.

DUFFY v. OAKES.

An attorney who is a justice of the peace for a borough, if sued by original for an act done in his office as magistrate, may plead his privilege in abatement.

THIS was an action for false imprisonment. The Defendant pleaded in the abatement of the writ, the privilege of an attorney to be sued by bill. The Plaintiff replied, that at the time of suing out the writ, the Defendant was one of His Majesty's justices of the peace

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for the borough of *Tamworth*, and that the trespasses were committed by him as such justice, in the execution of his office; and that notice in writing of the writ and cause of action was delivered to him one calendar month before the writ sued out. To this replication the Defendant demurred, and the Plaintiff joined in demurrer.

Vaughan Serjt. in support of the demurrer, cited *Comerford* v. *Price*, 1 *Doug.* 312. to shew that an attorney may plead his privilege in abatement in any case personal to himself, though it do not concern his duty as attorney; although he cannot, according to Lord *Raym.* 533, *Newton* v. *Rowland*, plead it when sued *in auter droit*.

Williams, Serjt. *contrà*. By stat. 5 *Geo.* 2. *c.* 18. *s.* 2. no practising attorney shall be capable to be a justice of the peace in a county, but the 5th section gives an exception as to magistrates of boroughs. By 24 *G.* 2. *c.* 44. *s.* 1. no writ shall be sued out against, nor any copy of any process at the suit of a subject served on, any justice of the peace, for any thing done by him in the execution of his office, without one month's previous notice in writing. It being admitted by the demurrer that the act done was in the execution of his office, the defendant was clearly entitled to a month's notice under that statute. This is decisive against the privilege, for the statute hereby contemplates, and even requires, that all actions against magistrates shall be commenced by writ or process to bring them into court. A writ clearly is not a bill, nor is process here meant for that which issues against an attorney, but against any common person. The act therefore supposes, that whether the Defendant is a county magistrate, or a borough magistrate, he must be sued like any other common person, and must have notice of the process. The act therefore virtually takes

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away the privilege of an attorney under ſuch circumſtances.

Vaughan in reply, the privilege of an attorney is general, that of a borough magiſtrate local. It cannot be intended by this local proviſion to repeal the general privilege; or if intended, it would have been more plainly expreſſed. [*Mansfield* C. J. The reaſon of the thing is with you, but the very terms of the act preſcribe a writ or proceſs, which ſeems to be that which is to bring a party into court: a bill of privilege is no proceſs, it ſuppoſes the Defendant to be already in court, and the very object of proceſs in that caſe fails, therefore no proceſs is neceſſary.] The act was meant in eaſe of the magiſtrate, and it would be hard in any caſe to turn it to his diſadvantage; and it may perhaps be conſidered as applying in this reſpect to county magiſtrates only.

Cur. adv. vult.

The judgment of the Court was now delivered by

MANSFIELD C. J. It was never intended probably that an attorney ſhould act as a magiſtrate; but in boroughs this might be neceſſary. The queſtion is, whether he is entitled to his privilege? Suppoſe he had been proceeded againſt as an attorney, and a notice of a bill had been given, I ſhould have thought this a compliance with the act, though the bill is neither a writ nor a proceſs. Then it follows that he has a right to be ſued in this manner, as an attorney.

Judgment for the Defendant.

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July 4.

An order for goods, written and signed by the seller in a book of the buyers, but not naming the buyers, may be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller claiming the performance of the order, to constitute a complete contract within the statute of frauds.

It is no objection to the validity of a contract for the sale of goods signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it.

THIS was an action of *assumpsit*: the first count of the declaration was for not delivering to the Plaintiff a parcel of rice; the second and third counts were upon the non-delivery of two several quantities of tobacco, to the amount of many hundred pounds, pursuant to a contract made by the Defendant's agent with the Plaintiff. Upon the trial of the cause at the *Warwick* spring assizes 1810, before *Bayley* J., it appeared that the Defendant's agent had written certain orders in a book, the property of the Plaintiff, the first of which was, "Ordered of *H.* and *G. Bennett*, *Liverpool*, 50 barrels fine "new rice, 23*s.*, 2 months and 2 months, as *per* sample, "in running numbers. *W. Wright*, *August* 23, 1809." Under this order had been written the following words: "This order to be executed if Mr. *Allen* does not hear from *Bennet* from *Liverpool* by *Saturday*:" but these words were afterwards struck out, in consequence, as it appeared, of a letter of *Bennet*'s to *Wright*, dated 28th *August*, in which they authorized him to give *Allen* 2 and 2 months, and said that, in order to have no disputes about quality, they had sent him an average sample of the rice in hand; he should let Mr. *Allen* see it, and, if not approved, he was welcome to relinquish the transaction. It was in consequence of the same letter that the words 2 months and 2 months were inserted in the order, for which words a blank space was left on the 23d of *August*, when the entry was originally made. The second order was, "From *H.* and *G. Bennet*, *Liverpool*, 12 cwt. fine shag "tobacco," (and other quantities of different specified sorts,) "at 3*s.* 8*d.*; 2*d.* *per* lb. discount; bill in 2 "months at —— months. *W. Wright*, *Sept.* 11, 1809." The third order was, "*H.* and *G. Bennet*, *Liverpool*, "8 cwt.

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"8 cwt. fine ſhag tobacco, 3*s.* 8*d.*; 2*d. per* lb. diſcount; "bill in 2 months at 2 months. *W. Wright, Sept.* 12, "1809." The book in which theſe orders were written, was not ordinarily uſed as an order-book; it had no title, but was a ſort of waſte book, containing various memoranda of different natures; and the Plaintiff's name was not found written upon or in any part of the book from the beginning to the end. There was no evidence that the Plaintiff had ſigned any contract or paper to bind himſelf. The Defendants heſitated to execute the order, and thereupon ſome correſpondence took place between the parties, in the courſe of which the Plaintiff, on the 23d of *September*, wrote a letter to the Defendants, wherein, after giving them references as to his credit, he added, "the eight hundred weight "of fine ſhag tobacco I wiſh immediately forwarded, as "I have ſold it, and it is wanted. I likewiſe want the "invoice of the rice and the other tobacco." It was objected for the Defendant that this was not, within the ſtatute of frauds, 29 *Car.* 2. *c.* 3. *ſ.* 17., a ſufficient note in writing for the ſale of theſe goods, inaſmuch as it did not at all appear by the contract, who was the buyer; all that could be gathered from the entries was, that they were contracts entered into by *Bennet*, to ſell goods to perſons not named, and who thoſe perſons were, could not be ſupplied by parol evidence. *Bayley* J. recollected the caſe of *Egerton* v. *Matthews*, 6 *Eaſt*, 307.; and inaſmuch as the merits were with the Plaintiff, at leaſt as to the rice, he refuſed to nonſuit him, but reſerved the point, ſubject to which the jury found a verdict for the Plaintiff, for 130*l.* The learned Judge afterwards expreſſed his regret that he had not recommended to the parties that the Plaintiff ſhould remit ſomething of the damages, and the Defendants pay the reſidue, inſtead of their fighting the point.

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Shepherd Serjt., in *Easter* term 1810, accordingly moved for a rule *nisi*, upon the authority of *Champion* v. *Plummer*, 1 *New Rep.* 252. In the case of *Egerton* v. *Matthews*, 6 *East*, 307., where the Court of King's Bench held a memorandum signed by the buyer only sufficient, it appeared by the contract who the seller was to be, which ingredient is here wanting, as it also was in the case of *Champion* v. *Plummer*, which was therefore distinguishable. With respect to the cases of contracts for the purchase of an interest in land, which will be cited, where a signature by one party has been held sufficient, as in *Seton* v. *Slade*, 7 *Ves.* 275., it is observable, that the 4th section requires only a note in writing signed by the party. Upon the 17th clause, it was essential that the names of both the contracting parties should appear on the contract. He also made a second point, that the declaration alleged that the rice was to to be paid for in two months from the date of the invoice; whereas the true construction of the order was, that it was to be paid for in two months from the delivery; and the difference was material, for the seller might send his invoice immediately, yet protract the delivery, and so improperly accelerate the payment even to the day of delivery. [*Mansfield* C. J. No doubt the two months would be explained by any merchant to be computed from the date of the delivery.] There was a further objection to the count on the second contract, that the declaration alleged it was to be paid by a bill at —— months, which was too uncertain, and the number of months agreed on could not be supplied by parol evidence. The Court granted a rule *nisi* on all the points.

Best and *Vaughan* Serjts. in this term shewed cause. They relied on the Plaintiff's letter of the 23d of *September*, as evidence that the Plaintiff was a party to the contract, inasmuch as it referred to the identical order

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for 8 *cwt.* entered in the book. [*Mansfield* C. J. The objection is not that there is no assent of the Plaintiff, but that it does not appear by the memorandum who the buyer was.] It is not necessary that the contract should express either who the buyer was, or who the seller was, it is sufficient if there be a memorandum or note, in writing, signed by the parties to be charged; but if it be necessary to prove by writing who was the buyer, it is proved by the correspondence. The legislature, knowing the hurry of commercial dealings, directed that it should be sufficient if there were any memorandum signed by the parties to be charged. And here the parties whom the Plaintiff seeks to charge, have by their agent signed a memorandum for the sale of the goods. *Egerton* v. *Matthews* is decisive on this point. There was no signature in that memorandum to bind *Egerton*, and though it is true that *Egerton* was there named, and the Plaintiff here is not named, yet the writing these contracts in the Plaintiff's book is at least equivalent to the naming him in that case, and Lord *Ellenborough* C. J. there decided, that it sufficed if the memorandum were signed with the name of the party to be charged therewith. [*Lawrence* J. If the Plaintiff's name had been in this book, I suppose there would have been no doubt about it, and that brings it to the case of *Champion* v. *Plummer.*] To make this case parallel to that of *Egerton* v. *Matthews*, it is only requisite that there be some writing signed by the Defendant, introducing the name of the Plaintiff, and this name is found in the Defendant's letter of the 28th *August*, to their agent *Wright*. In the case of *Saunderson* v. *Jackson*, 2 *Bos. & Pull.* 238., the name of the buyer is not at first inserted in the contract, but a letter is found referring to it, which was admitted, and it is only necessary to do here the same thing which was done in that case; to connect together the two papers which refer to each other.

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Shepherd, contrà. The case is now put upon a wholly different ground from that which it assumed at the trial whereon these letters were produced, not for the purpose of eking out the evidence of the contract, under the statute of frauds, but to prove the authority from the Defendants to *Wright* to make the contract for them, which was then disputed, but which the jury distinctly found to have been given. *Saunderson* v. *Jackson* was not decided on the ground that another letter could be connected with the contract; the only question there was, whether there were a sufficient signature of the sellers; and it was argued for the buyers, that whether the seller's name were printed or written, whether it were put at the top or the bottom of the paper, was immaterial, and it was merely decided that there was a sufficient signature by the seller to satisfy the statute. The point now in question was never there mooted. [*Mansfield* C. J. and *Lawrence* J. The case decided thus much, that supposing the name printed upon the bill of parcels would not suffice, the name might be supplied from the letter sent by the sellers. *Mansfield* C. J. If the signature of one of the contracting parties might be supplied by a letter written by him, *a fortiori* may a letter be used to shew who the buyer is, that buyer not being the party sought to be charged. There have been many cases in Chancery, some of which, I think, have been carried too far, where the Court has picked out a contract from letters, in which the parties never certainly contemplated that a complete contract was contained. Where a broker is introduced, the signature of the broker is the signature both of the buyer and of the seller; but this is not such a signature. This letter of the 28th *August* gives permission, that the Plaintiff might take or relinquish the transaction just as he pleased. What transaction? A purchase of the rice to be sure!] There is another material point. A pro-

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mise made in writing to satisfy the statute of frauds, if made without consideration, is not more (a) binding than a parol promise without consideration, made in a case that does not require writing. [*Heath* J. *acc.*] If there be a binding promise on one side, it is a good consideration for a promise on the other side; but in this case there is no signature by the Plaintiff upon which he could be charged, if the Defendant had occasion to sue on the contract; and if that be so, then there is no consideration for the promise of the Defendants upon which the Plaintiff now seeks to charge them. How can the statute of frauds so operate, as to make the written promise on one side valid, when it destroys the consideration for that promise (and which at common law, would have been a good consideration,) the validity of the promise on the other side to buy the goods. [*Mansfield* C. J. No such objection was ever taken in the case of *Champion* v. *Plummer*; it was there taken for granted, that there was a good consideration for the promise, if there was a signature in writing; and the words of the statute seem strongly to countenance such an interpretation, "signed by the parties to be charged therewith."] The words are "signed by the parties "to be charged by such contract;" and without a consideration there cannot be a simple contract. Again, even if the contract may be supplied by subsequent writings, yet it cannot be eked out by parol evidence. The declaration for the rice alleges a contract for payment at two months, and two months from the date of the invoice; and there is no evidence in writing that the time of payment was to be computed from the date of the invoice. [*Vaughan* objecting that this defence had never been made at the trial, the Court were unanimous that it could not now be taken.]

(a) *Rann* v. *Hughes*. *Dom. Proc.* 7 *T. R.* 350. n. *acc.* affirming the judgment of the Exchequer Chamber.

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MANSFIELD C. J. To be fure this cafe at firft fight comes near to the cafe of *Champion* v. *Plummer*, and the objection certainly there was, that the memorandum was not figned by the purchafer: that was a note made in what the report calls a common memorandum-book; this book certainly was not like what I at firft apprehended it to be, until it was produced; for I at firft thought this had been an order-book, with feveral orders figned by the perfons who ordered them, and I thought that where fuch an order was inferted in a regular order-book, and fuppofing that the perfon to whom it belonged, the place in which it was kept, and the purpofe for which it was employed, were confonant, it would in that cafe be no great ftretch to fay, this was a ground for inferring that thefe entries were made by the authority of the owner of the book, for the purpofe of evidencing the fale. But in this book, though not appropriated to the entering of orders, *Wright* writes as *Bennet*'s agent. The Defendant's counfel diftinguifhes between an order and an agreement to buy; but if I go to a fhop and order goods, do not I agree to buy them? The objection is that the name of the buyer does not appear in this book; but if it fufficiently appears that a fale was agreed on, I fee no objection why it fhould not be made out what was the name of the buyer by the writing of thefe very Defendants. In the firft place, in this very letter, wherein they give the time of payment of two months and two months, which is afterwards found in this very book, the buyer's name is twice mentioned; and in that letter they give him liberty to relinquifh the tranfaction. It is in writing, and it is evidently connected with the contract, that no doubt it may be coupled with the order in that order-book; and a valid contract may be eftablifhed by the evidence of feveral writings, as we often fee at *nifi prius*. It was then objected, that one party who has not figned, is not bound; but the fact was the fame

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same in the cases of *Egerton* v. *Mathews* and *Champion* v. *Plummer*, and the objection was never taken in either of these cases; but the whole of this case supposes that the Plaintiff had agreed: suppose he has not contracted by writing, he has by parol, and he is bound in honor; and it has never yet been decided that an obligation in honor would not be a good consideration. All these cases, *Egerton* v. *Mathews*, *Saunderson* v. *Jackson*, and *Champion* v. *Plummer*, suppose a signature by the seller to be sufficient, and every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can, there is no reason therefore to set aside the verdict, and the rule must be discharged.

HEATH J. was of the same opinion: and there is a case in *Strange* (*a*), by which it appears that a voidable promise is a sufficient consideration for a promise.

LAWRENCE J. It is sufficiently evident that this contract was entered into by the authority of the Defendant. It is stipulated, "this order to be executed if Mr. *Allen* does not hear from *Bennet* from *Liverpool* by *Saturday*." A letter comes, and the conditional parts of the order are struck out, and other terms of the time of payment are added: can you then say that this entry is not made by the authority of the Plaintiff, when he writes to the Defendants on the 23d of *September*, insisting on the performance of the contract? Then as to the want of consideration, that objection would quite overturn the cases of *Egerton* v. *Matthews*, *Saunderson* v. *Jackson*, and *Champion* v. *Plummer*; and the statute of

(*a*) Qu. Whether *Barjeau* v. *Walmesley*, *Str.* 1249. be here meant.

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frauds clearly supposes the probability of there being a signature by one person only; it speaks indeed of the buyer accepting a part of the goods, as contemplating that the buyer would be thereby bound; but the statute seems to be made chiefly for the security of buyers.

Rule discharged.

[IN THE EXCHEQUER-CHAMBER.]

HUBBARD *v.* JOHNSTONE, Assignee of T. WARD, a Bankrupt.

July 10.

If a ship, registered at one port, is transferred, while at sea, to a purchaser residing at another port in this kingdom, the proper mode of perfecting the transfer within the requisitions of the ship register acts, is by a registration *de novo* in her new port.

And it is not necessary for the ship to return to her former port, in order to have a memorandum of the transfer indorsed on her certificate of registration;

Nor is it necessary for the purchaser to send a copy of the bill of sale to her former port;

Nor to indorse a memorandum of the transfer on her certificate of registry within ten days after the ship returns to *England*. *By five Judges against two.*

The property of a ship vests in the purchaser instantly upon the execution of the bill of sale, not from the time of compliance with the register acts, defeasible, nevertheless, upon failure to comply with these acts. *Per Wood* B.

The stat. 34 *G.* 3. *c.* 68. *s.* 16. applies to the sale of an entire ship in the same port, as well as to the sale of a share or shares therein.

The ship-register acts, so far as they apply to defeat titles, and create forfeitures, are to be construed strictly, as penal, not liberally, as remedial laws. *Per Wood* B. and *Heath* J.

IN consequence of the case of *Bloxam and Others* v. *Hubbard*, 5 *East*, 407. (*a*), in which it was held that the order of the Lord Chancellor, directing that the Defendant in error should be removed from the office of assignee of the estate and effects of *Ward* the bankrupt, did not devest the property out of him without a re-assignment, in *Michaelmas* term 1804, the Defendant in error declared in trover, in the Court below, as assignee of the estate

(*a*) See also *Heath* v. *Hubbard*, 4 *East*, 110.

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and effects of *Ward*, for the ship *Fishburn*, and for one-sixth part of the *Fishburn*. Upon the trial of the cause, at *Guildhall*, at the sittings after *Michaelmas* term 1804, before Lord *Ellenborough* C. J. and a special jury, a special verdict was found, the substance of which was as follows: That *Ward*, the bankrupt, being the original and sole registered owner of the ship *Fishburn*, belonging to the port of *Newcastle-upon-Tyne*, in *April* 1810 cleared that ship outwards for the *Baltic*, where she was detained for a considerable time by an embargo of the Emperor of *Russia*: and that on the 9th of *November* 1801, *Ward*, by a regular bill of sale, in consideration of 4000*l*., assigned the whole of the ship to *Hubbard*, the Plaintiff in error, who then resided in *London*; and that the grand bill of sale of the whole ship was also delivered by *Ward* to *Hubbard*; that *Ward* wasa trader, and becoming indebted to *Wilkinson*, *Bloxam*, and *Tuylor*, in 100*l*., became a bankrupt by lying in prison two months and upwards for want of bail: that on their petition, upon the 24th of *March* 1802, a commission of bankrupt issued against *Ward*, who on the 27th was thereon declared a bankrupt: that on the 30th day of *April* 1802, the commissioners assigned the vessel, and all the estate and property of *Ward*, to *Johnstone*, amongst others; that *Johnstone* was duly chosen an assignee; by virtue of which assignment all the estate, interest, and property in the premises became, and still was, vested in *Johnstone*, as assignee; and that the commission still remained in full force; that on the 2d day of *February* 1802, *Hubbard* registered the ship *de novo* in the port of *London*; and the original certificate of registry granted to *Ward*, purporting on the face of it to be of the ship *Fishburn*, belonging to the port of *Newcastle-upon-Tyne*, was delivered up and cancelled; that on the 19th day of *February* 1802, *Hubbard* sold the whole of the ship, by public auction, to *T. Brown*, *R. Brown*, and *T. Old*, for 3630*l*., the net proceeds

proceeds being 3489*l.* 10*s.* 3*d.*; and by bill of sale of the 25th day of *April* 1802, assigned her to them: that *Brown* and Co. sent her to sea, and that the ship was lost on the 20th day of *February* 1803. And further, that the ship never returned to the port of *Newcastle-upon-Tyne* since she cleared outwards from that port for the *Baltic* in *April* 1800; but the embargo being taken off, she returned from the *Baltic*, and arrived at *Plymouth*; and that before the execution of the bill of sale by *Ward* to *Hubbard*, she had sailed, and was absent at the time of the execution thereof; that she afterwards returned to the port of *London*, and immediately thereupon *Hubbard* obtained a new register. It was further found that no transfer of property in the ship or any part thereof appeared in any document of the custom-house at *Newcastle-upon-Tyne*, either to *Johnstone*, or to *Hubbard*. That no indorsement of transfer was ever made to *Johnstone* on the certificate of the ship's registry, and that no demand of the ship was ever made on *Hubbard*. And if upon the whole matters it should appear to the Court that *Hubbard* was in construction of law guilty of the premises, then they assessed the Plaintiff's damages at 581*l.* 11*s.* 8*d.*, which was one-sixth part of the net proceeds of the sale to *Brown* and Co. Upon this finding, the Court of King's Bench, after two arguments, gave judgment for the Plaintiff below. The Plaintiff in this Court assigned for error, that by the record it appeared that *Hubbard* had a good title to the ship, by the assignment and registry *de novo*.

The case was thrice argued; first in *Trinity* term 1807, by *W. Scott* for the Plaintiff in error, and *B. Hall* for the Defendant; the second time in *Michaelmas* term 1807, by *Richardson* for the Plaintiff in error, and *Park* for the Defendant; the third time in *Trinity* term 1809, by

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R. Carr for the Plaintiff in error, and *Park* for the Defendant in error.

The very able discussion upon the first argument, which took place before the period when the present reporter began to take notes in this court, is already in print. Upon the second and third arguments, for the plaintiff in error, five points were contended. First, that upon the sale of the entire property in a ship to an owner in another port, a registration *de novo* was the appropriate mode of completing and recording the purchase. Secondly, that the stat. 34. *G.* 3. *c.* 68. *s.* 16., was applicable only to the case of a sale of share or shares, not of the entire property in a ship. Thirdly, that supposing the provisions of the 16th section apply to the total alienation of a ship, yet they did not require that a ship, sold while at sea, should return to her original port of registration, for the purpose of completing the transfer; but they applied only to the case where the ship being sold while at sea, was destined to return to her original port; so that the ship, being sold at sea, might, if the purposes of her new owner made it convenient, proceed to her port of registration *de novo*, without returning to her original port; which position, upon the third argument, was said to be distinctly recognized by the 34 *G.* 3. *c.* 68. *s.* 22. Fourthly, that the sixteenth section did not require that the purchaser, upon the sale of an entire ship while at sea, and not destined to return to the same port, should send a copy of the bill of sale to the port of her original registration; and 5thly, if the 16th section did require such copy to be sent, yet that the omission to send it did not vacate the sale as between the vendor and those claiming under him, and the vendee. The purchaser having necessarily produced to the officer of the customs in the port of *London*, where he resided, the bill of sale of the ship to himself, having delivered up the original

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certificate of regifter to be cancelled, having taken a new oath, that he himfelf, a *Britifh* fubject, was fole owner, and having, after a furvey taken to afcertain that the fhip was *Britifh* built, entered into a bond not to lend or part with the certificate of regiftry thus obtained, he had, by obtaining a regiftration *de novo*, fully fatisfied, as well the enactments, as the policy, of the feveral regifter acts. It is neceffary to take a review of the feveral ftatutes, and confider their object. By the ftatute 7 & 8 *W*. 3. *c*. 22. *f*. 17. "for a more effectual "prevention of frauds which might be ufed to elude "the intention of that act, by colouring foreign fhips "under *Englifh* names," it was enacted, that no fhip fhould be deemed or pafs as a fhip of the built of *England*, &c., or any of the plantations in *America*, fo as to be qualified to trade to, from, or in any of the faid plantations, until the perfon claiming property in fuch fhip fhould regifter the fame, as followeth, viz. if the fhip at the time of fuch regifter, doth belong to any port in *England*, &c., then proof fhall be made upon oath of one or more owners before the collector and comptroller of the cuftoms in fuch port; which oath, by fection 18, being attefted by the officer who adminiftered the fame, under his hand and feal, fhall, after being regiftered by him, be delivered to the mafter of the fhip, for the fecurity of her navigation; a duplicate of which regifter fhall immediately be tranfmitted to the commiffioners of his majefty's cuftoms in the port of *London*, in order to be entered in a general regifter, there to be kept for that purpofe; with penalty upon any fhip trading to, from, or in the plantations in *America*, and not having made proof of her built and property, as here directed, that fhe fhall be liable to fuch profecution and forfeiture as any foreign fhip would, for trading with thefe plantations, by that law be liable to. Although this ftatute applied only to fhips in the colonial trade, yet

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it was, by the ſtatute 26 *G.* 3. *c.* 60. *ſ.* 3. extended to all *Britiſh* built ſhips exceeding 15 tons, with certain exceptions, and in all its parts, wherein it is not thereby expreſsly altered, it ſtill continues in force. Theſe ſtatutes therefore are together to be ſo conſtrued, as if the enactments of the latter had been originally contained in the former. The firſt act does not in expreſs words direct what ſhall be done in the caſe of a change of the entire property in the ſame port: but it follows by neceſſary inference, that each ſucceſſive proprietor ſhall take the oath thereby preſcribed. In the caſe of a transfer of property to another port, it is required by the 21ſt ſection that there ſhall be a regiſtration *de novo*, and that the former certificate ſhall be delivered up to be cancelled, and in caſe there be any alteration of property in the ſame port, by the ſale of one or more ſhares in any ſhip after the regiſtering thereof, that ſuch ſale ſhall always be acknowledged by indorſement on the certificate of the regiſter, in order to prove that the entire property in ſuch ſhip remains to ſome of the ſubjects of *England*. This is in eaſe of the owners. The transfer of property in a ſhip to another port may be made in two ways, firſt by an owner reſident in or near one port, ſelling to an owner reſident in or near another port; ſecondly, by the owner changing his reſidence from one port to another, and bringing his ſhip with him; neither of the two caſes in which the legiſlature have expreſsly directed a regiſtration *de novo*, viz. a change of the ſhip's name, and a transfer of the ſhip to another port, neceſſarily implies a change in the property. The transfer in the ſame port, which is to be evidenced by indorſement, does not refer to the local ſituation of the ſhip; (if it did, there could be no ſuch thing as a transfer of property in the ſame port,) but it means the relation of the two owners to the ſame port. It means a contradiſtinction between a transfer which

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will, and one which will not, change the domicile of the ship. These two expressions do not, as the Court below thought they did, comprehend the transfer, of property that might be made in every possible local situation of the ship, whether in port or at sea; the phrase of alteration of property in the same port is restricted to such a transfer as does not change the domicile of the ship. The substituted registry by indorsement, does not therefore apply to the present case, of a transfer of a ship at sea, never intended to return to the same port. The distinction taken by the statute of *W.* 3., between indorsement on the certificate of registry, and registration *de novo*, has been recognized and pursued by all the subsequent statutes. In the present case there is not only a transfer of property, but also a transfer to another port; therefore whether this had been a sale of the whole interest or of a part only, the change of port would have required a registration *de novo*. The statute 26 *G.* 3. *c.* 60., enacts various alterations in the law. Much stress has been laid on the circumstance that this is an act for altering and amending the former, and also for extending it to other ships. The 4th section requires that no registry shall be made but at the port to which the vessel belongs. It is argued from this, that no registry can be made in the ship's new port; but the argument would extend so far as to operate as a complete bar of any ship ever changing her port at all. The 5th section defines her port to be that "from and to which she shall usually trade;" but if she is sold into a new port, her new port becomes that to which she shall usually trade. The sections 9, 10, & 11, repeal the former oath, and give one much more full. Section 12 directs a survey of the ship to be made before certificate granted, to identify her, and ascertain her built: these are amendments of the statute of *W.* 3. By the 15th section, the owners are

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are required to give a bond conditioned that the certificate ſhall not be ſold, lent, or otherwiſe diſpoſed of, and ſhall be ſolely uſed for the ſervice of the ſhip for which it was granted; and that in caſe the ſhip ſhall be loſt, taken by the enemy, burnt, or broken up, or otherwiſe prevented from returning to the port to which ſhe belongs, the certificate, if preſerved, ſhall be delivered up to the officers of the cuſtoms; and that if any foreigner ſhall purchaſe, or otherwiſe become entitled to any intereſt in ſuch ſhip, the certificate ſhall be delivered up in order to be cancelled. This ſection, taken with the ſtatute of *William*, clearly ſhews that there muſt be a regiſtration *de novo* when the domicile of the ſhip is altered. The whole tenor indeed of the regulations contained in the firſt fifteen ſections evidently ſhews that they are intended to be complied with by the owner of the ſhip for the time being, and the univerſal practice of the port officers has been according to this idea. If the entire intereſt may paſs, as will be contended, without regiſtration *de novo*, the government is deprived of all theſe ſecurities for the owner being not a foreigner; without it, there will be neither oath, nor ſurvey, nor bond; for it cannot be contended that if the property is transferred, the former obligor, who has diſcharged his duty while owner, will be ſtill liable on his bond for the act of the aſſignee. [*Mansfield* C.J. Though it could not be meant that the bond ſhould operate after a new bond was given, it is not inconſiſtent that it ſhould be in force until a new bond was ſubſtituted.] It would be hard that the obligor ſhould be liable on his bond, after he had ceaſed to have a controul over the ſhip. But with a regiſtration *de novo* the government has abundant ſecurity that the ſhip-owner muſt comply with the requiſitions of the acts, and no other ſecurity needs to be added. The ſixteenth ſection of the 26 *G.* 3. begins like a new act of parliament, re-

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citing that "the provisions touching the indorsement on "certificates of registry, in case of any alteration of the "property in any ship or vessel in the same port, had "been found insufficient," clearly making a distinction between the case of a transfer of the property in the same port and in any other port, without adverting to the circumstance whether the ship is at sea or in port at the time of the transfer; and enacts that in every *such* case, meaning an alteration of property in the same port, besides the indorsement before required, there shall be indorsed on the certificate of registry, the name and place of abode of the purchaser and his principals or partners, and the purchaser or his agent shall also deliver a copy of such indorsement to the person authorized to make registry and grant certificates of registry, who is thereby required to cause an entry thereof to be indorsed on the affidavit on which the original certificate of registry was obtained, and to make a memorandum thereof in the book of registry thereby directed to be kept, and to give notice thereof to the commissioners of the customs under whom he acts. Notwithstanding that this preamble, using the words "in case of any alteration of property in the same port," seems to embrace rather a wider scope than the 21st section of the 7 & 8 *W.* 3. *c.* 22. comprehends; yet there is strong reason to contend that the effect of this section is confined to those cases only which were comprised in that, namely, a partial transfer of property in the same port; for if it extends to the sale of entire interests, the legislature fail of their object, by not obtaining the security of an oath and a bond from the new owners. This security is less necessary upon a sale of a part, because the remaining original owners are still liable on their bond. But even if this section extends to sales of the entire interest, yet it applies solely to the case where by the former act an indorsement was to be made on the certificate

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certificate of regiſtry, viz. an alteration of property in the ſame port: it does not extend, as the Defendant in error will contend it does, to every poſſible caſe of tranſfer of property. It does not at all touch the caſes in which a regiſtration *de novo* is requiſite: it ſays, in every *ſuch* caſe, not in every caſe. The Court will not ſtrain their faculties to extend what is called the policy of the act, by adding new requiſitions which are not expreſſed in the act, eſpecially in one which introduced ſuch important differences into the law as it before ſtood on this ſubject. If then the law were now ſuch as it was after the paſſing of the 26 *G.* 3., the Plaintiff in error has omitted nothing which was required by that and the former act. Then comes the 34 *G.* 3. *c.* 68., the fifteenth and ſixteenth ſections of which do not apply to a caſe like this, where a regiſtration *de novo* is required, that is, a caſe in which the ſhip's domicile is changed. The 15th ſection recites, "that by the laws then in force, upon any al-"teration of property of any ſhip in the ſame port to "which ſhe belongs, an indorſement on the certificate "of regiſtry is required to be made." This has been relied on, to ſhew that the proviſions of that ſection were intended to embrace every poſſible alteration of property, but it refers to the pre-exiſting ſtatutes of *W.* 3. and 26 *Geo.* 3., and therefore was not deſigned to extend more widely than they did; and the latter, though the words are looſe, muſt, like the former, be reſtricted to the ſale of a partial intereſt, or otherwiſe ſales of the entire property would evade the intent of the ſtatute. This 15th ſection then preſcribes a particular form to be purſued in *ſuch* indorſement, and enacts, that it ſhall be ſigned by the perſon transferring, and that a copy of ſuch indorſement ſhall be delivered to the perſons authorized to make regiſtry, otherwiſe ſuch ſale, or contract, or agreement for the ſale thereof, ſhall be utterly null and void. It then proceeds to direct that the officer ſhall cauſe an

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entry of the copy of such indorsement to be indorsed on the oath on which the original certificate of registry was obtained, and shall make a memorandum thereof in the book of registry, and forthwith give notice thereof to the commissioners of the customs. This enactment in words applies only to the same case to which the sixteenth section of the preceding act applied, an alteration of property in the same port; and the only difference between the two statutes, in this part, is, that whereas under the former act it was open for the purchaser to express the indorsement in such language as he pleased, this act prescribes a set form. It is observable that this clause cannot apply to any case where there is to be a registration *de novo*; for there, a new affidavit is made; but this indorsement is to be made on the original affidavit, whereas upon a sale, whereby the ship changes her port, and obtains, as she must, or at least may obtain, a registration *de novo*, the original certificate of registry being thereupon given up to be cancelled, the original affidavit becomes an useless instrument. And to what purpose should these indorsements be afterwards made thereon? But in the case of a transfer in the same port, these indorsements are useful and operative. If then in the one case the compliance with these requisitions would be nugatory, in the other operative and useful, it is a strong argument that the legislature intended to confine them to the case in which they would be useful, that is, to the case of a transfer where the ship does not change her domicile. If then any enactment be at all found respecting the transfer of the entire property in a vessel, made at a time when she is not in the port to which she belongs, it must be found in the 16th section of the 34 *G.* 3. whereby it is provided, "that if any ship or vessel shall be at sea, or absent from the port to which she belongs, at the time when *such alteration in the property* thereof

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shall be made *as aforesaid*, so that an indorsement (*a*) *on the* certificate cannot be immediately made, the sale, or contract, or agreement for the sale thereof, shall, notwithstanding, be made by a bill of sale, or other instrument in writing as before directed, and a copy of such bill of sale, or other instrument in writing, shall be delivered, and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the book of registers, and notice of the same shall be given to the commissioners of the customs, in the manner thereinbefore directed; and within ten days after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made and signed by the owner or owners, or some person legally authorized for that purpose by him, her, or them, and a copy thereof shall be delivered in manner thereinbefore mentioned, otherwise such bill of sale, or contract, or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever, and entry thereof shall be indorsed, and a memorandum thereof made in the manner thereinbefore directed." It is said, that the provisions of the 15th and of this section, directing what shall be done when a ship is sold in port, and what when a ship is sold at sea, comprehend all the possible cases of transfers of property; but the 16th section is merely a proviso attached to the former section, and regulating what shall be done in such cases where the directions of the preceding section cannot be literally and immediately complied with, its operation is restricted therefore to the transfer of property in a ship in the same port, when the ship itself happens to be at sea. It is contended by the Defendant in error, that in order to make a valid sale of a ship at sea, in compliance with this section, she must at all events return to the port to which she originally

(*a*) *Sic. Rotul. Park.*

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belonged. It is impossible that the legislature could ever have contemplated a provision so absurd and so destructive to the commercial interests of the country. A very great trade is now carried on in *Pulopenang*, and other parts of *Asia*, and in *Prince Edward's Island*, and other our colonies in *America*, in building ships, which are sent hither with their first cargo, and here sold. Under the construction contended for, it would be necessary to send them back thither, in order to indorse the sale there upon the certificate of registry, for the act extends to all ports of the King's dominions. [At the close of the second argument, the Court expressed their decided opinion that it was not requisite, for the purpose of completing the transfer of a ship sold at sea, that the ship itself should return to the port of her original registration.] Neither was it necessary for the purchaser to transmit to the officer at *Newcastle* a copy of the bill of sale, because this was a transfer of the entire interest in the ship to another port, a case in which registration *de novo* is the appropriate mode of perfecting and recording the transfer. The 16th section provides for the like transfers of a ship at sea, for which the fifteenth provides in the case of a ship in port. If the 7 & 8 *W.* 3. *c.* 22. *s.* 21. and 26 *G.* 3. *c.* 60. *s.* 16. apply to sales of partial interests only, then the 16th section of the 34 *G.* 3. *c.* 68. must apply to partial interests also. That the legislature have recently understood the latter part of that section of the statute of *William* to apply only to the sale of partial interests, clearly appears from the preamble of the 21st section of 34 *G.* 3. *c.* 68., which recites the statute of *W.* 3. as enacting that, in case there be any alteration in property in the same port, by the sale of one or more share or shares in any ship, after registering thereof, such sale shall be acknowledged by indorsement, and that it is expedient to authorize the issuing of registers *de novo*, in any

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any case where part of the property of any ſhip ſhall be ſo transferred, if the owners of ſuch ſhip, whoſe property therein has not been ſo transferred, ſhall be deſirous of having the ſhip regiſtered *de novo* inſtead of the indorſement on the old regiſter, and proceeds to enact accordingly. This preamble, therefore, almoſt in terms recites, that the ſtat. of *W.* applies indorſement to the ſale of partial intereſts only, and goes far to ſhew that all the clauſes ſubſequent to and built on the ſtat. of *W.* 3. apply to the ſale of partial intereſts only, and not to the ſale of the entire ſhip. [At the cloſe of the ſecond argument, the Court intimated their decided opinion, that the 16th ſection of the 34 *G.* 3. related as well to the transfer of the entire property as of a ſhare or ſhares in a ſhip.] It is not, however, neceſſary to the ſucceſs of the Plaintiff in error to evince that, upon a ſale of the entire ſhip in the ſame port, regiſtration *de novo* is neceſſary, for this is the caſe of the transfer of a ſhip at ſea to another port. There can, however, be no doubt, but that all the regulations of this ſection equally are confined to the caſe where a ſhip, which is ſold at ſea, is intended to return to the port from which ſhe ſailed. The Court has already ſaid, that if a ſhip is built at *Pulopenang* or *Newfoundland*, it is not neceſſary for her to return to that port in order to complete the formalities of a ſale. And for what conceivable purpoſe, when the ſhip is not intended to return to the ſame port, are all theſe indorſements to be made? It is ſaid, for the purpoſe of tracing the hiſtory of the ſhip. But the ſtatute no where ſays, that the object of the legiſlature is to trace the hiſtory of a ſhip: the ends it deſignates are, the preventing foreign property, in ſhips enjoying the privileges of our flag, from being maſqued by the appearance of *Britiſh* ownerſhip. As far as human foreſight can go, though it is poſſible that falſe oaths may be taken, this purpoſe

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is effected by exhibiting the certificate of property obtained in every port upon oath. But it is not true, that any chasm would be created in the history of the ship by reason of her not transmitting a copy of the bill of sale to her former port. The 35th section of the stat. 26 *G.* 3. requires the officers of the out-ports monthly to transmit to the commissioners of the customs in *London*, a true and exact copy, together with the number, of every certificate granted. At the head office, therefore, is to be found the entire history of every ship, the history of that period of her duration, for which she has belonged to each port, being remitted from each port respectively; and the several parts being connected, form the entire series of her history. Her identity may be sufficiently traced by her exact admeasurement and description. The 22d sect. of the stat. 34 *G.* 3. is a complete legislative recognition that, in the cases where a registration *de novo* is required, (and this is one of those cases,) a ship needs not to return to her former port, for it recites that *British* ships, the property of which is in whole or in part transferred to persons not being subjects of his majesty, are not entitled to the privileges of *British* ships, and that to prevent frauds in the employment of such ships as *British*, contrary to the intention of the laws of navigation, they are now by law required, in certain cases, to be registered *de novo*, for which purpose it is necessary that such ship should proceed with all due diligence to the port to which she belongs, or to *any other port in which she may be legally registered*, by virtue of the stat. 26 *G.* 3. in order to be registered *de novo*, and then proceeds in substance to enact that, in the cases of any such transfer of property while the ship is upon the sea on a voyage to a foreign port, or while she is in a foreign port, or while she is on a fishing voyage, so soon as the master is made privy to the transfer, the ship shall immediately complete her outward voyage and delivery, or her

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her delivery, or her fishing voyage, and shall ship at such foreign port, or at any port in her direct homeward voyage to the port in which she may be so registered *de novo*, a cargo of such goods as may legally be imported into that port; and every such vessel shall be registered *de novo* as soon as she returns to the port of his majesty's dominions to which she belongs, or to any other such port in which she may legally be registered by virtue of the said act. [*Mansfield* C. J. That section enumerates and provides for the three cases, where a ship is going to a foreign port, is in a foreign port, or is on a fishing voyage, but it omits a fourth case, that in which she may be sold while she is at sea on her homeward voyage: it certainly destroys the argument that in all cases the ship is bound to return to the port to which she belongs. The person who penned that act undoubtedly had it his contemplation that, by the existing laws, the ship might in some cases be sold at sea, and a registration *de novo* take place; but he has left the world to guess what those cases are, for not a word in any one act states in what cases ships are to be registered *de novo*, except the provisions in the statute of *W.* 3.] The cases in which registration *de novo* is proper, are those where the ship does not intend, (and if she does not intend, it is admitted she is not compelled,) to return to her original port, and in which she therefore is not bound to observe the requisition of making an indorsement within ten days after her return. The last question is, supposing that the 16th section requires, in case of the sale of a ship absent from her port, that although she does not intend to return to the same port, a copy of the bill of sale shall nevertheless be delivered to the officer at her former port, whether it also annuls the sale in consequence of the non-compliance with that requisition. The sixteenth section directs, that if any ship shall be at sea when such alteration in the property thereof shall

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be made, the ſale ſhall notwithſtanding be made by ſuch bill of ſale, and a copy of ſuch bill of ſale ſhall be delivered; if it had been intended that the failure to deliver a copy ſhould avoid the ſale, the act would have ſaid ſo immediately in this place, becauſe as well the common rules of juſtice and common ſenſe, as the deciſions of the Courts, *Ratchford* v. *Meadows*, 2 *Eſp. N. P. Rep.* 59., and other caſes, evince that a ſale is not avoided by the failure or neglect of the officers of the crown, and the delivery of the copy is the only act directed to be done by the purchaſer while the ſhip continues at ſea; but the ſection proceeds in the ſame breath to direct that an entry thereof ſhall be indorſed on the oath, and a memorandum thereof made in the book of regiſters, and notice thereof given to the commiſſioners of the cuſtoms, acts which are all of them to be done by the officers. Then comes a pauſe, ſucceeded by an entirely new part of the ſection, directing what ſhall be done within ten days after the ſhip's return, otherwiſe ſuch bill of ſale ſhall be utterly null and void: theſe words are applicable to a failure to comply with theſe laſt requiſitions of the ſtatute only, which are to be performed after the ſhip returns to port, and are not applicable to an omiſſion to ſend the copy of the bill of ſale; in order to reach which, the vacating clauſe muſt overleap the enumeration of the other acts which are to be done by the officers; whereas if it applies to the omiſſion to ſend the copy, all rules of grammatical conſtruction demand that it ſhould likewiſe apply to the omiſſion of thoſe acts, to which it decidedly does not apply.

Arguments for the Defendant in error.—The great fallacy lies in urging the Court to decide upon the ſtrict letter of theſe numerous and intricate acts, without conſidering them as what they truly are, remedial acts, the policy whereof the Courts will do all they can to effectuate. The 35th ſection of 26 *G.* 3. affords the

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ſtrongeſt argument to prove that it was the intention of the legiſlature to create the means of tracing the hiſtory of every ſhip from her cradle to the grave. It may be admitted that the ultimate end is the excluſion of foreign owners, but this is the mode by which they have determined to effectuate that excluſion. In 11 *Veſ. jun.* 621. *Meſtaer* v. *Gilleſpie*, Lord *Eldon*, Chancellor, aſſiſted by *Grant*, Maſter of the Rolls, has delivered an opinion upon the policy of theſe acts. There, the purchaſer carried the bill of ſale to the port to which the ſhip belonged, within the ten days: but the ſeller fraudulently kept out of the way, whereby, and by the intervention of *Chriſtmas* day and ſeveral holidays at the cuſtom-houſe, the purchaſer was prevented from perfecting the ſale within the time preſcribed. Yet even there the Maſter of the Rolls "doubted whether there were any "admiſſible evidence of the agreement to purchaſe, except "that very bill of ſale, which was to all intents and pur-"poſes void and null. It was to be conſidered," he ſaid, "that this act was framed, not for the purpoſe of aſcer-"taining the rights of parties againſt each other, or pro-"tecting them from fraud, but with the view to a great "purpoſe of public policy; and the act in all its pro-"viſions compels them to obſerve regulations, not in "any degree requiſite for their own private intereſts, "in order to accompliſh the ends of the acts. It may "be ſaid, the legiſlature having propoſed their object, "propoſed the only means by which that object was "to be ſecured; judging of the propriety of enforcing "that object, and by ſuch means; embracing that ob-"ject, and preſcribing thoſe means, whatever incon-"venience might reſult to private individuals. The "harſhneſs therefore in particular inſtances is not to be "taken into conſideration: the object being not to "provide for the intereſts of parties, as againſt each "other, but at all events to obtain that great object of

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" public policy; to which it might be thought right to " facrifice individual convenience and juftice, according " to ordinary rules." Lord *Eldon*, Chancellor, fays, in the fame cafe, that " the object of thefe acts being, that " there fhould be a public regiftry, acceffible, of the " ownerfhip of all veffels navigating to and from the " *Britifh* dominions, the legiflature had declared that " this object fhould be fecured by a bill of fale, that " fhould be fuch in the form and contents, as to mani- " feft all the circumftances neceffary to fecure the know- " ledge, who were the owners from time to time, by which " the hiftory of the fhip, from the moment fhe was " built, might be purfued." At *Newcaftle* the complete hiftory of this fhip may be traced down to her transfer to *Heath* (*a*), but no further. In *Reeve's Law of Shipping*, (2 edit. 473., 1 edit. 501.) *Macneal's* cafe, the opinion of Lord Prefident *Camden* is very important, in anfwer to the argument of the Plaintiff in error, which has ingenioufly been directed to tie down the attention of the Court to the queftion of fraud between individuals. Lord *Camden* there confidering that the ftatute of *William* had directed, that in the cafes of change, whether of the name or of the property of a fhip in another port, it fhould be regiftered *de novo*, points out how obnoxious to frauds, and how perfecty inefficacious for the purpofes intended, this regulation was, he expreffes his opinion that the 26th *Geo.* 3. was to be conftrued as a remedial act, and he lays down the rule that " where " property of a fhip is transferred in another port, fhe " muft with all diligence proceed to the proper port " where fhe may be regiftered: this port muft be that " of which fhe is, as it were, an inhabitant. This cir- " cumftance is a part of the certificate, is a part of the

(*a*) The transfer to *Heath* did not appear on this fpecial verdict; it may be feen in *Heath* v. *Hubbard*, 4 *Eaft*, 110.

 " oaths,

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"oaths, and is essentially necessary to the registry." In fact the officers of the custom-house have shamefully violated the law of the land, by habitually granting registration *de novo* in the cases of entire sales in the same port. There is only one case in which registration *de novo* is allowable on a sale in the same port, and that is, where new part-owners are thrust in upon a former one, and then if he chuses it, he may obtain a registration *de novo*, & *expressio unius est exclusio alternis*. Lord *Camden* says that "the statute of *W*. 3. did not point "out the particular port where a ship should be regis-"tered, the consequence of that want of provision in "the act, had been the multitude of frauds that were "then continually practised in the registry of ships; "for in any port whatever, if a person presented him-"self, and took the oath required by that act, he was "entitled to have the ship registered. For it was re-"markable that the act required no other security than "the transient oath, as he called it, of any man what-"soever, who chose to offer himself, and who the next "minute, might slip away and never be heard of after-"wards." And he had before said that "if it should be "once laid down that such a ship might register in "any other port than that where she was first registered, "he was satisfied that the act of the 26th of the king, "which he said was founded upon the best principles, "and was wisely and sagaciously contrived by the "noble person who was the author of it, to prevent the "many frauds committed under the act of king *Wil-"liam*, would be wholly disappointed of its effect." Why? because this vessel might be in five hundred different hands between the time of her leaving *New-castle* and the time of her registration in the port of *London*, and nothing of that would appear upon either register; there would be a complete break and chasm in her history. Lord *Camden* therefore considered that the

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26 *G.* 3. had in every case, but the single one of an old part owner desiring it, abrogated the right permitted by the statute of *William*, to take out a registration *de novo* upon a change of property. If the government, in order to ascertain the whole maritime force of the kingdom, were to require from the ports a return of all the shipping thereto belonging, this ship would be twice returned, once from *Newcastle*, evidenced by the original registry and indorsements, and again from *London*, evidenced by the registration *de novo*. To prevent this, the Plaintiff in error should have gone to *Newcastle* with the copy of his bill of sale, and should have required an entry thereof to be made upon the copy of the affidavit on which the original registry was obtained, and also to be made in the original register books there. Then the Commissioner at *Newcastle* would have been able to return that the ship had at that period ceased to belong to their port, and that her subsequent history was to be sought in *London*. It has been asked (by *Mansfield* C. J.) whether, consistently with the doctrine of the Defendant in error, any insurance could effectually be made by the purchaser, after his purchase, upon a ship bought while at sea, and uninsured. It might; two things are to be done to perfect the purchase, the one *instanter*, no time is given; in *Moss* v. *Charnock*, 2 *East*, 405. it was held that the purchaser cannot take a reasonable time, and make the sale good by relation. This is to be perfected though the ship be at sea, and until it is done, no property passes. The other is to be done within ten days after the ship's return; and if she be prevented from returning by the act of god, or the king's enemies, the purchaser has a legal excuse for not doing that which was to be done after her return; and the omission in that case would not so defeat his title as that he could not recover on the policy. But in this case the Plaintiff in error never did that which he

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might well have done while the ſhip was at ſea, he could not therefore have called on the Court to declare he had an intereſt in the policy, when he had not done that which was neceſſary to give him an intereſt. In *Hayton* v. *Jackſon*, 8 *Eaſt*, 511. a caſe which in circumſtances was exactly like this, *Lawrence* J. went into the hiſtory of the regiſter acts: he threw regiſtration out of the queſtion. [Here the counſel for the Defendant in error read the whole judgment of *Lawrence* J. in that caſe, p. 522.] It is not competent for the ſhip to ſend her certificate to her former port to have the indorſement made thereon, without going herſelf. By theſe acts, any one may ſeize her, if ſhe is found without a certificate, and it is true, that if a ſhip built at *Calcutta*, be ſold when ſhe is within twenty leagues of *Great Britain*, ſhe muſt, after delivering her cargo, return to *Calcutta* for the purpoſe of completing the transfer. [*Mansfield* C. J. Nothing in the act ſays it ſhall be neceſſary ſo to do, and to be ſure it is abſurd to ſuppoſe that a perſon in *Europe*, buying a ſhip built in *Aſia*, muſt ſend her back thither to be regiſtered, before he can have any property in her. The 22d ſection of 34 *G.* 3. clearly ſuppoſes caſes in which ſhe needs not to return to her former port, although it ſeems as if the penner of the act had, in drawing the 16th ſection, ſuppoſed that a ſhip muſt in all caſes return to her former port.] The courts have leaned towards this conſtruction, if they have not abſolutely ſo ſaid. The 22d ſection does not recognize that a ſhip may return to a new port to obtain regiſtration *de novo* in this particular caſe, and it was never heard, that where it is neceſſary to make an expreſs legiſlative proviſion in three caſes, and no proviſion is made for a fourth, that the fourth ſhall therefore by common law follow the rule of the three. It is for the Plaintiff in error to ſhew that this ſhip was in ſuch a caſe, that ſhe might, under the 26 *G.* 3., to which this

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this section refers, go to another port to be registered *de novo*. [*Mansfield* C. J. It does not appear that in any one of the three cases provided for by the 22d section, the ship is authorized by the 26 *G*. 3. to be registered *de novo*.] The alteration of property mentioned in these acts is not confined to a sale of part of the property, but as *Le Blanc* J. in *Hayton* v. *Jackson*, says, the provisions of the two sections, the 15*th* and 16*th* of the 34 *G*. 3. *c*. 68., were intended to embrace every case of the transfer of property in a ship. It was said in that case, that the ship was not *so absent* from her port, as that registration could not be made, and was therefore not within the 16*th* section; but *Le Blanc* J. held that "if she were not *so absent*, as to bring her within the 16th section, then the requisites of the 15th section ought to have been complied with." The effect is, that a person may sell a ship at sea, if he will, but he must immediately record upon the affidavit the history of the transaction. If it be a duty imposed on the officers of the customs to return the certificates to the commissioners, it certainly must be intended that copies of the certificates should be lodged with them. [*Mansfield* C. J. That begs the question: the statute only makes it a duty on them to return copies of such papers as they have, but the 35th section does not shew what papers they are to be: it is certainly true, as Lord *Camden* says, that if these papers are not to be registered in the original port, there will be a chasm in the ship's history there, it will not appear what is become of her. A copy of the bill of sale sent to the original port would answer that purpose, though the ship itself never returned to that port, for it would shew to all persons enquiring, what was become of that ship.] It is not necessary to produce the old certificate in order to produce a registration *de novo*. [*Wood* B. Yes, it was rendered necessary by the *st*. *W*. 3., in case of obtaining a registration *de*

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novo upon the ship's changing her name. *Graham* B. The register in *London* plainly shews it to be a purchase from *Ward*, a resident at *Newcastle*; it sets forth the bill of sale.] *Ward* may have changed his own domicile, and then the chain is lost. But not the judges of the court below only, Lord *Eldon*, Chancellor, and *Grant*, Master of the Rolls, in *Mestaer* v. *Gillespie*, 11 *Ves*. 621. are of the same opinion. The copy of the bill of sale therefore must at least go to the original port, even if the ship need not. [*Graham* B. Is it sufficient to send a copy of the bill of sale? The section provides that an indorsement shall be made and signed by the owner and owners, or some person legally authorized by them upon the certificate of registry, therefore he or they must come to the original port to indorse it. *Mansfield* C. J. That part of the section strongly implies that the penner of the act intended a case where the ship would return to her original port.] The argument raised against avoiding the sale for want of sending the copy, which is founded on the intermixture of acts to be done by the party, and acts to be done by the officers, falls to the ground, when it is considered that in the 15th section the clause for vacating the sale follows after precisely the same omission of the owner, as that which in the 16th is mixed with the omissions of the officer, viz. if the indorsement be not made and signed by the person transferring, and a copy thereof delivered to the officer, and it cannot be intended that the same omission which shall avoid the sale in one instance, shall not avoid it in another.

Arguments in reply.—The extreme reluctance with which the Defendant in error gives up the necessity of the ship's returning to its original port, sufficiently shews that the rest of his argument is untenable unless he can sustain that. The position that the sale is incomplete because a complete history of the ship cannot now be deduced,

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duced, is not founded in fact. In compliance with the stat. 34 *G.* 3. *c.* 68. *f.* 20. before registration *de novo* can be granted, the officers must require the production of every bill or other instrument of sale, by which the property in the ship is transferred. That bill of sale recites the certificate of registry at length. The purchaser also produces the certificate itself, bearing indorsed thereon all the intermediate sales, and these instruments have been previously certified by the officers of the inferior port to the head office in *London*, so that when the registration *de novo* is granted, the head office has the means to trace the entire history of the ship to the present day. [*Mansfield* C. J. That does not help you to make out a complete history of the ship in her original port; the argument is, that you ought to be able, by enquiring at her original port, to trace her complete history.] It is true that the registration *de novo* in *London* is not necessarily certified back to the inferior port, but the statute does not require it, though in fact the head office does communicate intelligence to the officers of the inferior ports. Bnt it suffices if the ship's whole history is to be found here at this head office, and as to the argument that if the ship's name be changed, all traces of her are lost, the statute 26 *G.* 3. *f.* 19., now prohibits any owner to give any name to a ship other than that by which she was first registered. The main argument for the Defendant, is, that a copy of the bill of sale ought to be sent to *Newcastle*, which is answered by the rule, *noscitur a sociis*, for that requisition is found in company with one, which by the judgment of the Court needs not to be complied with, the ship's return thither. Supposing that the penner of the act founds himself on a mistake in thinking that in the cases mentioned by the 22d section, the stat. 26 *G.* 3. enables ships to obtain a registration *de novo*, yet it is a clear legislative exposition by himself, that

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that he did not underſtand that he had himſelf in any previous part of the act required that a ſhip ſhould return to the ſame port, and unleſs it be eſſentially requiſite that the ſhip ſhould return to the ſame port, there is no need of any indorſement ſubſequent to her return. The caſes determined in the court of King's Bench were diſſimilar to this. In *Hayton* v. *Jackſon*, the ſhip belonging to *Shields*, was not at the time of the ſale, at ſea, but in the port of *London*. It was not in that caſe contended that the 16th ſection did not apply to the caſe of a ſhip ſold at ſea, but that it did not apply to the caſe of a ſhip ſold while ſhe was lying in another *Engliſh* port, conſequently not in ſuch a ſituation that indorſement might not be immediately made. The court of *King*'s *Bench* indeed thought the 16th ſection applied to the caſe of all ſhips abſent from their own port, but all thoſe caſes are of weight only for their reaſoning, not as an authority to be cited in a court of appellate juriſdiction. *Meſtaer* and *Gilleſpie* was the caſe of a ſale of a ſhip at ſea, by a ſeller in *London* to a buyer in *London*. [*Mansfield* C. J. That was not cited as a ſimilar caſe, but only to ſhew the opinion of two noble perſons on the policy.] *Macneal*'s caſe is not applicable, it bears no ſimilitude to this. Lord *Camden* calls *Macneal* a ſea vagabond, having no known reſidence, no property, no relations, no friends, having only a colourable intereſt in the property. [*Mansfield* C. J. How is a transfer made to another port?] By the owner changing his reſidence. The words in the ſtatute of *W*. 3. "transfer of property to another port," are deſerving of particular attention, for they are retained through all the ſucceeding ſtatutes, and by words of reference, in the 16th ſection of 34 *G*. 3.

Cur. adv. vult.

The judges not being unanimous, on this day, delivered their opinion *ſeriatim*.

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WOOD B. Having recapitulated the facts of the case, proceeded thus:

The question is, whether *Hubbard* is, in construction of law, guilty of the trover and conversion. It is contended by the assignee of the bankrupt, that the property in the ship did not pass from the bankrupt to *Hubbard* by the bill of sale, because a copy of the bill of sale to *Hubbard* was not delivered to the proper officer of registry at the port of *Newcastle*, which, it is insisted, is required by the statute 34 *G.* 3. *c.* 68. *ss.* 15, 16., and consequently the assignee entitled to recover. On the other hand, it has been contended that this case is not within those sections, this being a transfer of the whole of the property in the ship to another port. I will consider this case in two points of view; 1st, What is the effect of the non-delivery of the bill of sale, supposing the case to be within either of those sections: 2dly, Whether those sections apply to this case at all. To ascertain the true construction of these sections, it will be necessary to refer to the provisions of former statutes on this subject. The statute 7 & 8 *W* 3. *c.* 22. is an act for preventing frauds and regulating abuses in the plantation trade. This act professes to be made for the more effectual prevention of frauds which might be used to elude the intention of the act, by colouring foreign ships under *English* names. It had been the object of prior acts, to confine the trade of this kingdom and its colonies, to ships of the built of this kingdom and its colonies, and navigated by *British* mariners; and to exclude foreigners from that trade. The act then provides, that no ship shall be deemed or pass as a ship of the built of *England*, *Ireland*, *Wales*, &c. or of His Majesty's Plantations in *America*, so as to be qualified to trade to, from, or in any of the said plantations, until the persons claiming property in such ship or vessel should register her at the port to which she belonged, in the

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manner therein prefcribed. By fection 21. the fhip's name is not to be changed without regiftering the fhip *de novo*. The fame is to be done upon any transfer of property to another port. If there be any alteration of property in the fame port, by the fale of one or more fhares in any fhip after regiftering thereof, fuch fale fhall be acknowledged by indorfement on the certificate of the regifter, before two witneffes, in order to prove that the entire property in fuch fhip remains to fome of the fubjects in *England*, if any difpute arifes concerning the fame. This ftatute feems not to have provided for the cafe of an alteration of the entire property in the fhip in the fame port. The ftat. 26 *G.* 3. *c.* 60. *f.* 3. recites that it was highly expedient that the provifions made for regiftry of fhips by the act of *W.* 3 fhould be altered, and amended, and extended to other fhips than thofe which are therein particularly defcribed; and therefore it is extended to all fhips, and directs how they are to be regiftered, and the form of the certificate. Section 4. directs that no regiftry fhall be made or certificate granted in any other port or place than the port or place to which fuch fhip or veffel fhall properly belong, and that the regiftry and certificate, if granted in any other port, fhall be void. By fection 5. the port to which fhe fhall be deemed to belong, within the meaning of that act, is declared to be the port from and to which fuch fhip fhall ufually trade, (or being a new fhip,) fhall intend to trade, and at or near which the hufband or acting and managing owner or owners of fuch fhip or veffel ufually refides or refide. Section 16. recites that the provifions made in the faid recited act, (referring to the ftatute of *W.* 3.,) touching the indorfement on the certificate of regiftry in cafe of any alteration of property in any fhip or veffel in the fame port to which fhe belongs, have been found infufficient; and provides that in every cafe, befides the indorfement required by that act, there fhall

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alſo be indorſed on the certificate of regiſtry before two witneſſes, the town, place, or pariſh, where all and every perſon or perſons to whom the property in any ſhip or veſſel, or any part thereof, ſhall be ſo transferred, ſhall reſide. And the perſon or perſons to whom the property is ſo transferred, or his or their agents, ſhall deliver a copy of ſuch indorſement to the perſon authorized to make regiſtry and grant certificates. The officer's duty is then ſtated; he is to cauſe an entry thereof to be indorſed on the oath or affidavit on which the original certificate was obtained, he is alſo to make a memorandum thereof in the book of regiſters, and he is alſo to give notice thereof to the commiſſioners of the cuſtoms in *England* or *Scotland*. It has been argued that this proviſion only applies to the caſe where one or more ſhares in a ſhip, leſs than the entirety of the ſhip, are ſold, and not to the ſale of the whole of the ſhip. But, I muſt own, it appears to me to apply to the ſale of the whole ſhip as well as to ſhares. But then I apprehend it is only applicable to thoſe caſes where the property is transferred in the ſame port to which the ſhip belongs. Here let us conſider what would be the conſequence if this proviſion were not complied with. I take it to be clear, ſo far as the ſtatutes have hitherto gone, that if there were no regiſtry, no certificate, no indorſement, and no delivery of a copy, the ſale would be good as between the vender and vendee, though for want of theſe requiſites the ſhip, if ſhe traded, would be treated as a foreign ſhip, and liable to confiſcation; there being no words, as yet, declaring the ſale null and void for want of theſe requiſites. Hitherto there is nothing that even requires that the ſale of a ſhip, or a ſhare in a ſhip ſhall be in writing; it might have been by parol, ſave in caſes where the ſtatute of frauds might require a writing. The ſtatute 26 *G.* 3. *c.* 60. *ſ.* 17. requires, that when and ſo often as the property in any

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ſhip or veſſel belonging to His Majeſty's ſubjects ſhall be transferred to any other ſubject, in whole, or in part, the certificate of the regiſtry ſhall be truly and accurately recited in words at length, in the bill or other inſtrument of ſale thereof, and that otherwiſe ſuch bill of ſale ſhall be utterly null and void to all intents and purpoſes. This clauſe does not poſitively ſay that there ſhall be a bill of ſale in writing, but that if there be, the certificate ſhall be recited therein. By the ſtatute 34 *G.* 3. *c.* 68. *ſ.* 14. it is enacted that no transfer, contract, or agreement for transfer, of property in any ſhip or veſſel ſhall be valid or effectual for any purpoſe whatſoever, either in law or equity, unleſs made by bill of ſale, or inſtrument in writing, containing ſuch recital as preſcribed by the ſaid act of the 26th *G.* 3. When a bill of ſale is made in writing, truly reciting the certificate of regiſtry according to this ſection, it is, as I conceive, a good and valid bill of ſale, and transfer of property, as between vendor and vendee, from the moment of its execution, and needs nothing more to perfect it; yet ſtill it may be defeated or rendered void, by the non-performance of certain ſubſequent acts required to be done on the part of the vendee, where it is expreſsly ſo declared. What are thoſe omiſſions? They are deſcribed in the 15th and 16th ſections, or one of them. Section 15. recites, that by the laws then in force, upon any alteration of property in any ſhip or veſſel in the ſame port to which ſhe belongs, an indorſement upon the certificate of regiſtry is required to be made; and it enacts that ſuch indorſement ſhall be made in a preſcribed form, and ſigned as therein mentioned, and a copy of ſuch indorſement ſhall be delivered to the perſon authorized to make regiſtry and grant certificates, otherwiſe ſuch ſale, or contract or agreement for ſale thereof, ſhall be utterly null and void to all intents and purpoſes whatſoever; and the officer is to make certain entries and memoranda, and

and to give notice to the commiſſioners of the cuſtoms, ſimilar to the proviſion in the 26 *G.* 3. *c.* 60. *ſ.* 16. No time is here limited within which the copy of the indorſement ſhall be delivered, and therefore I take it, the inference of law is, that it ſhall be done within a reaſonable time, and until that time is elapſed, I hold the bill of ſale remains good, and the property legally transferred to the vendee. In the preſent caſe the ſhip was not in port, but was at ſea, and had her certificate along with her, and therefore ſhe was not within the proviſion of the 15th ſection. Is ſhe then within the 16th ſection, which applies to a ſhip at ſea, or abſent from the port to which ſhe belongs, at the time when the alteration in the property is made, ſo that no indorſement can be made on the certificate of regiſtry? What is to be done in that caſe? The ſale ſhall notwithſtanding be made by a bill of ſale or other inſtrument in writing, as before directed, (that is, containing a recital of the certificate,) and a copy of ſuch bill of ſale or other inſtrument in writing ſhall be delivered, and an entry thereof ſhall be made on the oath or affidavit of regiſtry, and a memorandum in the book of regiſters, and notice is to be given to the Commiſſioners in the manner thereinbefore directed. "And within ten days after ſuch ſhip or veſſel ſhall return to the port to which ſhe belongs, an indorſement "ſhall be made on the certificate, and a copy thereof "delivered in manner hereinbefore mentioned, otherwiſe ſuch bill of ſale, or contract, or agreement for "ſale thereof, ſhall be utterly null and void to all intents "and purpoſes whatſoever," and then it directs an entry thereof to be indorſed, and a memorandum made, as before directed. Here there are annulling words, and to how much of this ſection do theſe words apply? I think they are confined to the laſt mentioned caſe, namely, the not making an indorſement on the certificate, and delivering a copy to the proper officer, if the ſhip

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ship returns to the same port. It has been supposed that these annulling words extend to the antecedent provision for the delivery of the copy of the bill of sale; but I think that is not the true construction, because this section, after requiring the copy of the bill of sale to be delivered, requires certain acts to be done by the officers of the customs, viz. indorsement on the affidavit of registry, a memorandum in the book of registers, and notice to the commissioners; and if the annulling words, which come after all the words, were to be so extended, it would make the bill of sale void for the omissions of the officers of the customs, which would be so monstrous, that the legislature could never intend any such thing; and how I am to single out the first member of the sentence, and say it shall extend to that, and not to the intermediate ones, I am at a loss to find out. The only rational construction I can put, is, that the annulling words do not extend to the former directions of the clause, and if not, the non-delivery of the copy of the bill of sale does not defeat the bill of sale; and I am not disposed to make a construction by inference, to defeat a bill of sale, or create a forfeiture. This difficulty has been attempted to be obviated, by contending that no property passes from the vendor to the vendee till all these things have been done; and the case of *Moss* v. *Charnock*, 2 *East* 392., has been cited to prove that position: and it is said, that if an act of bankruptcy intervenes before the delivery, although the delivery be within a reasonable time afterwards, the vendee loses the ship. With great deference to that authority, I cannot agree to it. I think the property passes instantly by the bill of sale, and that the subsequent acts to be done are not necessary to transfer the property, but that the grant is defeasible by subsequent omissions, in cases where it is so expressly provided, but not otherwise. If it were not so, then there could be no transfer of the property when

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when a ſhip was at ſea, until ſhe had returned to her port, and an indorſement on the certificate had been made, and a copy delivered to the officer; and even though the ſtatute gives 10 days after her return to do it in, yet if an act of bankruptcy happened within the 10 days, and before it was done, the ſale would have no effect. This in my humble opinion would be extremely injurious to the public, and is contrary to the ſpirit, and even the letter of the proviſion, which ſuppoſes and recites, that there may be an alteration in the property of a ſhip or veſſel whilſt ſhe is at ſea, or abſent from the port to which ſhe belongs. On this ground therefore I am of opinion that the judgment of the Court of King's Bench is erroneous. There is alſo another ground not hitherto touched on, and that is, that this ſpecial verdict does not find as a fact, that a copy of the bill of ſale was not delivered to the proper officer: it ſtates a circumſtance of evidence from which the jury might infer it, but facts, not evidence, ought to be ſtated in a ſpecial verdict; however this would only go to the granting a *venire de novo;* I lay no ſtreſs on this point, and I do not found my opinion upon it. The next point of view in which I ſhall conſider this queſtion, is, whether theſe two ſections, the 15th and 16th of the 34 *G.* 3. *c.* 68. or either of them, apply to this caſe: and I think they do not. The 15th ſection does not apply to it, becauſe that is confined to the alteration of property whilſt the ſhip is in the port to which ſhe belongs, that is, where ſhe is regiſtered, which is not this caſe. The 16th ſection, I think, does not apply to it, becauſe I think it applies only to the caſe where the ſhip is at ſea, or abſent from the port to which ſhe belongs, and means to return to that port; that is, where ſhe has not changed her domicile by transfer to another port, which I conceive this ſhip had done. The nature of the proviſion of the 16th ſection, ſhews, that the legiſlature only

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contemplated the case of a ship being at sea, or absent from the port, and meaning to return to it, because all the requisitions are put in the conjunctive, and the last of them is an act to be done within ten days after her return. It is evident therefore that they only contemplated a case where *all* the requisitions could be complied with. But it has even been argued that a sale of a ship at sea cannot be made good, unless the ship actually puts herself into a situation to comply with every one of these requisites by returning to her registered port. Such an interpretation of the statute would be attended with monstrous inconveniences to the public without any one benefit. In that case, if a ship is registered abroad, say in the *East* or *West Indies*, and is sold in *Great Britain*, she must be obliged to go back again to the *East* or *West Indies*, to make an indorsement on her certificate, deliver a copy of the indorsement, and then bring her certificate to *Great Britain* to be registered *de novo*; and for what purpose? In order that her certificate may be cancelled and destroyod, and a new one granted here, when she is registered *de novo*. Is it possible any such thing could ever be intended? On the contrary, look at the 22d section, and it is manifest the legislature meant otherwise; for it is expresly provided, that a ship sold at sea may either return directly to the port to which she belongs, or to any other port where she may be legally registered by virtue of the 26 *Geo.* 3.; and that as soon as she returns she may be registered *de novo*. This section does not appear to have been adverted to in the Court of King's Bench, and it might escape their notice, because there is a mistake in the marginal note of the contents of the section, which would lead one to suppose it related only to ships transferred to persons not subjects of his Majesty, whereas it provides regulations to prevent the transfer of ships to persons not subjects of his Majesty, and to prevent their fraudulently obtaining the benefit of

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British ſhips, by directing that ſhips ſold at ſea ſhall proceed without delay to complete their voyages, and return to this country, either to the ports to which they belong, or to ſome other, to be regiſtered *de novo*. It is manifeſt to my underſtanding that neither of theſe ſections, the 15th and 16th, apply to the caſe in queſtion. This caſe, is the caſe of a ſhip transferred to another port, in order to be there regiſtered *de novo*, and where her former certificate muſt be delivered up to be cancelled, according to the beforementioned ſtatute of 7 & 8 *W*. 3. *c*. 22. There is nothing to prohibit the owner of a ſhip from changing her domicile, from one port to another, and regiſtering her for trade there: a transfer of property to another port, (as I take it,) means a ſale to a perſon living at another port, who removes her to that other port, and regiſters her there *de novo*, as the port from and to which ſhe is in future to trade. This is conformable to ſections 4 & 5 of the 26 *Geo*. 3. *c*. 60. This is a ſhip, whilſt out at ſea, ſold to a perſon reſiding in *London*, who takes her to that port, and there regiſters her *de novo*. There ſhe gains a new ſettlement, or domicile, and the port of *Newcaſtle*, (her former regiſtered port,) has nothing further to do with her. The inſtant a bill of ſale is executed, transferring her to another port, the officers of her former port have no further account to keep of her. Neither do I ſee any public utility to be derived from delivering a copy of the bill of ſale to the officers of the port ſhe has quitted. Her identity and ownerſhip (which are the objects of theſe regulations,) are fully aſcertained to the officer of her new port by the production of her bill of ſale, (which muſt always recite her certificate of regiſtry,) and by the delivering up of her old certificate, with all the transfers of property indorſed upon it, to the officer who grants a new certificate. Suppoſing, inſtead of being ſold at ſea, ſhe had gone directly from *Newcaſtle* to the port of *London*,

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and had been there regiſtered *de novo*, would there have been any neceſſity to have ſent any notice to *Newcaſtle*, to be entered there, of her transfer to the port of *London?* There is nothing I can find, that requires it, nor any public policy that makes it expedient. The object of the regiſtry of ſhipping, and of granting certificates, and making indorſements, was not to regiſter titles for the ſecurity of purchaſers, but to guard, (as the firſt ſtatute expreſſes it,) againſt coloring foreign ſhips under *Engliſh* names, and to furniſh evidence to the officers of government, that they were really *Engliſh* ſhips. Is not this ſufficiently guarded by the proviſion contained in the 22d ſect. of the 34 *Geo.* 3.? which requires when a ſhip is at ſea when ſold, that ſhe ſhall perform her voyage and return without delay either to the port to which ſhe belonged, or to ſome other, to be regiſtered, otherwiſe ſhe would be treated as a foreign ſhip, and ſubject to confiſcation. Are not her identity and ownerſhip ſufficiently aſcertained to the officer who regiſters her *de novo* in conſequence of a ſale, by producing to him the bill of ſale, and delivering up her former certificate with all its indorſements of transfers of property upon it? Is ſhe not by theſe means traced from port to port from her birth, with ſufficient certainty, to prevent foreigners having the benefit of her navigation? And I cannot ſee how ſending a copy of the bill of ſale to the port ſhe has quitted can be of any public utility. Upon the whole, according to the beſt judgment I can form upon theſe complicated proviſions, many of which are obſcurely worded, I cannot help thinking that upon this ground alſo the judgment is erroneous.

GRAHAM B. This queſtion depends on the conſtruction of the 16th ſection of the ſtat. 34 *Geo.* 3. *c.* 68. The 15th ſection recites that by law, upon any alteration of property in any ſhip in the ſame port to which it belongs, an

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an indorfement on the certificate is required to be made, and enacts that fuch indorfement fhall be made in form therein mentioned, by the perfon transferring, or fome perfon lawfully authorized by him, and a copy of fuch indorfement fhall be delivered to the perfons authorized to make regiftry and grant certificates, otherwife fuch fale, &c. fhall be void: and the perfons authorized to make regiftry, &c. are required to make an entry thereof, (i. e. of the copy of the indorfement,) to be indorfed on the affidavit on which the original certificate was obtained, and alfo make a memorandum thereof in the book of regiftry, and forthwith give notice to the commiffioners of cuftoms: then it gives the form of the indorfement on the certificate, expreffing the names of the vendor and vendee, with their places of refidence, its date, the fignature of the vendor, and atteftation by two witneffes. This applies to alterations of property while the fhip is attached to its own port. In this cafe the vendee muft fhew, firft, an indorfement in form on the certificate; fecondly, he muft deliver a copy of the indorfement, if not, his contract is void; the reft is to be done by the officer. The 16th fection comes to the cafe of a fhip at fea, or abfent from her port. This may be in feveral cafes; firft, the fhip may be deftined to return to its port: 2dly, it may be fold *bonâ fide* while at fea, to an owner at *London* or other *Britifh* port or fettlement, never to return to her original port: 3dly, it may be fold at a *Britifh* factory or fettlement abroad: 4thly, it may be fold in either of the two latter cafes to a foreigner. By fection 16. it is provided, that if any fhip fhall be at fea or abfent from the port to which fhe belongs, at the time when *fuch* alteration in the property fhall be made as aforefaid, (grammatically, fuch as the preceding fection fpeaks of,) fo that an indorfement on the certificate cannot be immediately made, the fale or contract fhall be by bill of fale, and a copy of it fhall be delivered to

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the proper officer, and an entry thereof ſhall be made on the affidavit, and a memorandum made in the book of regiſters, and notice given to the commiſſioners of cuſtoms; (theſe latter articles are directory, and nothing is ſaid of avoidance of the contract if theſe be not done;) then the clauſe goes on, connecting thoſe proviſions with what follows; "and within 10 days after ſuch ſhip ſhall return to the port to which ſhe belongs, an indorſement ſhall be made, and ſigned by the owner, or ſome perſon lawfully authorized by him, (not ſaying on the certificate, but I preſume that muſt be meant,) and a copy thereof delivered, in manner thereinbefore mentioned, (referring to the copy required by the 15th ſection,) otherwiſe ſuch bill of ſale ſhall be void, and an entry thereof ſhall be indorſed, and a memorandum made in manner before mentioned. Now the clauſe directing a copy of the bill of ſale to be delivered, neither mentions the time when, nor annexes any avoidance to the omiſſion, but looks only to the time of the ſhip's return, and makes the avoidance depend on ſomething which can only be done in caſe the ſhip returns, namely, the maſter's bringing home the certificate, on which the owner may make the indorſement, and deliver a copy of it; from which the indorſement may be made on the affidavit, and the other requiſites may be complied with: and this was ſo ſtrongly felt, that at firſt it was argued by the Defendant in error that the ſhip muſt neceſſarily return to her former port. What would a ſhip-owner ſay who ſells his ſhip at ſea, and who was told it was neceſſary to comply with the regulations of this ſixteenth ſection? He would anſwer, what avails it to ſend a copy of the bill of ſale? I muſt alſo, if I am within this ſection, comply with all its requiſitions, not with one only. I muſt make an indorſement on the certificate, and ſend a copy o the indorſement within 10 days after my ſhip's return to *Newcaſtle*. But it will not return thither;

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will it satisfy the act, if I do it within 10 days after its return to *Falmouth*, &c.? The act has not said so. Then this section cannot be complied with but upon condition that the ship shall return to her original port of registry, and it may be impossible for her ever so to do. In sending the bill of sale, when it will never be followed up by the other requisites, I do a nugatory thing. I must therefore look elsewhere in the act for my case. The direction of the delivery of the bill of sale, is connected with the indorsement to be made on the certificate, and the delivery of a copy of that indorsement to the proper officer. It is vain to do the first only; or if you construe the act to mean, that if he does not do all which his situation will admit of, his sale shall be null, you do not construe the words; that is rather to introduce a new proposition. Suppose, then, the purchaser had delivered a copy of the bill of sale, yet as he made no indorsement on the certificate, nor delivered a copy of it, his contract was void. No construction can save him from the words of the act. But, it is said, the object of the act was, to have the earliest notice of the transfer. It may be so; but the legislature has in this clause neither fixed a time for doing it, nor said what shall be the consequence of not doing it; the act looks only to the ship's return to port, and has elsewhere provided for its speedy return. The 17th section proceeds to the case where the owner resides at a *British* factory abroad, and provides for it imperfectly enough. Section 20. recites that, "it is expedient "that the officers appointed to make registry, in case "any ship is required to be registered *de novo*, should "be authorized to require the production of the bill of "sale," and enacts, that when the property in a ship shall be transferred in the whole or in part, and such ship shall be required to be registered *de novo*, it shall be lawful for the registering officers to require the bill

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of sale. Provided always, that all other regulations concerning the registry *de novo* be complied with.' Section 22. provides for the registry *de novo* by reference to the 26 *G.* 3. *c.* 60. Whereas *British* ships, transferred to persons not subjects of his majesty, are not entitled to the privilege of *British* ships; and to prevent frauds, they are now by law required, in certain cases, to be registered *de novo*, for which purpose it is enacted that such ship should proceed with due diligence to the port to which she belongs, or to any other port in which she may be legally registered by virtue of the act 26 *G.* 3. in order to be registered *de novo*, it is hereby enacted, that as often as any such transfer of property in any ship shall be made while such ship is upon the sea on a voyage to a foreign port, in case the master is privy to such transfer, or if not, as soon as he is, such ship shall proceed directly to its destined port, and shall sail from thence to the port of his majesty's dominions to which she belongs, or to any other such port in which she may be lawfully registered by virtue of the said act: then it provides for the case of a transfer while the ship is in a foreign port, or on a fishing voyage; concluding, "and every such ship or vessel as aforesaid shall be registered as soon as she returns to her port, or to any other port in which she may be legally registered by virtue of the said act." But it is said, that the 26 *G.* 3., to which this section refers, makes no provision for a registry *de novo*, and that this act therefore, only recognizing the legality of such a registration *de novo* as is directed by that act, does nothing. The 26 *G.* 3. *c.* 60. *s.* 3. takes up the purview of the 7 & 8 *W.* 3. purporting to alter and amend it, and extend it to other ships than those therein described, and enacts that all and every ship or vessel of 15 tons or upwards, belonging to any of his majesty's subjects, shall, from times referable to their different situations, be registered, and obtain certificates

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in this form: "In pursuance of an act passed in 26 G. 3., "intituled, &c. having taken and subscribed the oath "required by this act, and that the said ship was, at such "a time and place, built," &c. It is true that this act does not direct a registration *de novo* in the present case: but that is because it has made no new provision at all for the case of a ship sold not in the same port: the 16th section speaks only of alteration of property in the same port. But the mis-recital, if it be such, is a mere inaccuracy in the penning of this section. The stat. 26 G. 3. provides for the original registry, and gives the form, and substitutes a new oath for that prescribed by 7 & 8 W. 3. and directs the bond not to sell or dispose of the certificate. Therefore in giving this form, the act in truth does direct the form of registration *de novo*: and the recital means only that the registry *de novo* shall be in the form, and attended with the requisites prescribed by the act. The former part of the preamble of the 22d section more correctly says, that ships are *by law* required, in certain cases, to be registered *de novo*; and in fact it is provided for by section 21. of the 7 & 8 W. 3. c. 22., which enacts, that no ship's name registered, shall be afterwards changed without registering such ship *de novo*, which is thereby required to be done upon any transfer of property to another port, and delivering up her former certificate to be cancelled, under the penalties and in the like method as is thereinbefore directed. The same section shews that the history of the ship may be sufficiently traced in the case of a registration *de novo*; it enacts that, "in case there be any alteration of property in the same port, by the sale of one or more share or shares in any ship after the registering thereof, such sale shall be acknowledged by indorsement on the certificate;" if therefore the former certificate be delivered up and cancelled, that certificate does as clearly shew from what port the ship comes, as the other documents could

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could do. The production therefore of the bill of sale and delivery of certificate to be cancelled, sufficiently mark the identity of the ship.

CHAMBRE J. was prevented by indisposition from attending, but *Mansfield* C. J. stated, that he was authorized to say for him, that he concurred with the majority of the judges in reversing the judgment.

LAWRENCE J. having sat in the court below when judgment was given there, delivered no opinion upon the present occasion.

THOMSON B. was of opinion that the judgment ought to be affirmed.

HEATH J. The question in this cause is, whether the ship in question having changed her port on her sale she was properly registered *de novo*, pursuant to the statute of 7 & 8 *W*. 3. *c*. 22., or whether the provisions of the 16th section of the 34 *G*. 3. ought to have been complied with. On behalf of the Plaintiffs in error it has been contended, that the 16th section of the 34 *G*. 3. is to be restrained in the construction to the shares of ships only, and is not to be extended to the transfer of the entire property of a ship. It was so argued in the Court below, and the attention of the Court of King's Bench was drawn to that question only. If this cause were to be decided on that point, I should be for affirming the judgment. But on the most mature consideration which I can give the subject, I am of opinion, that the 16th section is not a substantive independent clause, but is merely a qualification of the antecedent clause, and is to be restrained to the case when the ship is at sea when she is sold, and does not change her port. It will be necessary for me to take a short review of the three several statutes relative to this subject. The stat. of

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8 & 9 *W*. 3. requires a regiſtering *de novo* on a change of port only: the queſtion is, whether that ſtatute be in this reſpect repealed by the proviſions of any ſubſequent ſtatute. The ſtat. of 26 *G*. 3. *ſ*. 16. makes no alteration in that reſpect; but the ſtatute of 34 *G*. 3. adds new proviſions for the better effectuating the purpoſes of that act, among which one is, to direct a book of regiſters to be kept in each port, and notice to be given of every new regiſtration to the commiſſioners of the cuſtoms, which is extremely important in the light wherein I view the ſubject. Now I come to the 34 *G*. 3. *c*.68. *ſs*. 15, 16., which directs what is to be done, according to the preamble, on any alteration of property of any ſhip in the ſame port. Two caſes are put; the 15th ſection regards the caſe where the ſhip is in her port at the time of the ſale; the 16th ſection, when ſhe is at ſea. The 16th ſection, though in form it is merely a qualification of the 15th ſection, inaſmuch as it refers to it, and is by way of proviſo, yet it is contended that it muſt likewiſe be conſidered as a ſubſtantive independent clauſe, and as repealing the ſtat. of 8 & 9 *W*. 3., which directs that, on a change of port, there ſhall be a regiſtration *de novo*. It has been aſſerted by Mr. *Park* at the re-hearing, and in my judgment gratuitouſly aſſerted, that if the conſtruction for which they contend be not adopted, theſe acts will be totally defeated, and foreigners will be enabled to become owners and part-owners in our ſhips without fear of detection, and that it will be impoſſible to trace a ſhip from her built, if the port ſhall be changed and a regiſtration *de novo* ſhall become neceſſary. In anſwer to this aſſertion I ſhall obſerve, that it is not ſtated in any part of this ſtatute, that the regiſtering *de novo* on the transfer of a ſhip has been attended with any inconvenience, or that the purpoſes of the ſtatute in queſtion would be better anſwered by ſubſtituting another proviſion; nor is it expreſſed in terms that the proviſions of the

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the section in question are substituted in the place of a registry *de novo*. It will be found in perusing the different parts of this act, that when it is intended to modify or repeal the provisions of any former statute, it is so expressly mentioned. The 16th section is likewise by way of proviso, and by every rule of grammar and logic it can only be considered as a clause dependent on a former clause, unless the manifest intention of the legislature required a different construction. In construing doubtful clauses it is very useful to trace the method which the drawer of the act has observed in the distribution and arrangement of his subject. In this act the drawer has arranged his subject under different and distinct heads, and to each head has prefixed an appropriate preamble. Now the preamble of the 15th and 16th sections states them to relate to the alteration of property in any ship or vessel in the same port. If the legislature had intended that the 16th section should extend to all cases of transfer, it would have used clear and explicit terms. Though this statute be remedial, yet it is very penal if all its requisitions be not complied with. For it annuls the contract, and leaves the purchaser to seek relief from, perchance, a fraudulent or insolvent vendor. In case of bankruptcy or insolvency it occasions a certain loss. These statutes are made for the advancement of trade and commerce, and to regulate the conduct of merchants. If laws of this sort be not perfectly clear and intelligible to persons of their description, the legislature, by the use of such ambiguous clauses, would lay a snare for the subject: a construction which conveys such an imputation ought never to be adopted. I think that the same rule ought to obtain here, as in the construction of clauses inflicting pains and penalties in the revenue laws, if they be ambiguously and obscurely worded, the interpretation is ever in favor of the subject; for this plain reason, that the legislature is ever at hand

to

to explain its own meaning, and to exprefs more clearly what has been obfcurely expreffed ; and therefore if the fuppofed confequence were to follow, which I by no means allow, I fhould lean againft the forfeiture, and leave it to the legiflature to correct the evil, if there be any. I cannot perfuade myfelf in the prefent inftance, that any merchant of plain fenfe and underftanding could ever entertain the moft remote fufpicion of the 16th claufe extending to all cafes of transfer. If any thing can warrant fuch a conftruction, it muft be the general utility, which I am at a lofs to difcover. If any fufpicion fhould arife whether a fhip in part or in the whole belongs to a foreigner, it would be either in the port to which fhe belongs, or where fhe happens to have been built, but moft generally in the port to which fhe belongs. In the firft cafe the regifter will give the hiftory of the fhip, when and where fhe was built. If fhe has belonged to feveral perfons at different times, and confequently has been often regiftered, fuch regifters are depofited with the commiffioners of cuftoms, purfuant to the ftat. 34 *G.* 3., by means of which the fhip may be traced from the port where fhe was firft regiftered. By fuch means it may always be difcovered whether a fhip be *Britifh* owned, and is *Britifh* built, the two principal objects of the legiflature. If the conftruction contended for by the Defendants in error be adopted, it will afford a very eafy evafion of the ftatute. For if a foreigner fhould be minded to have a property in *Britifh* fhipping, he needs only to make his purchafe in a port different from that to which fhe belongs; and then change her port ; and he will neither make oath nor give fecurity. Thefe are the pledges on which the legiflature principally relies for the efficacy of the act. Thus he may evade it and elude difcovery : add to this, that according to the conftruction contended for by the Defendant in error, if the fhip be fold when abfent from

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her port at the most distant quarter of the world, she must return to her port before the sale can be complete; a monstrous grievance, most unnecessarily inflicted. A strong argument may be drawn from the 20th section of the 34 *Geo.* 3. at the end, namely, "Provided always that "all the other regulations required by the laws in force "concerning the registering *de novo* of ships and vessels "be complied with." This provision recognizes and enforces the two former statutes of 7 & 8 *W.* 3. and 26 *Geo.* 3. *sect.* 21. My conclusion therefore is, that the stat. of 7 & 8 *W.* 3. in this respect is not repealed, but is still in force, and therefore the registration *de novo* is right and proper. For these reasons, as I am of opinion that without this forced construction of the 16th section of 34 *Geo.* 3. it may be discovered by the several provisions of these three statutes, whether a ship be *British* owned and *British* built, the two great objects of the legislature, and as a different construction would tend to defeat the purposes of these statutes, the judgment of the Court of King's Bench ought to be reversed.

MACDONALD C. B. A transfer may be made, either to a person of the same port, or of a different port, of the ship being at home, or at sea. The stat. 7 & 8 *W.* 3. is the foundation of all. This requires a registration. And the 21st section requires a new registration on a change of port, and in that case requires the old certificate to be delivered up. It requires that when the property is to be changed in the same port, then the change shall be indorsed on the registry. This distinction is not repealed by the subsequent act, but improved. Nothing about this is found in the 26 *G.* 3. The subject is taken up in 34 *G.* 3. *c.* 68. *ss.* 15, 16 & 17., all these I construe together. The 16th section is a restriction on the 15th. The 15th applies only to transfers of ships in the same port, and the 16th section applying to the same subject, but

but contemplating a temporary abfence of the fhip, fo that the certificate could not be had, fubftitutes the next beft thing. The penner of this act expected the fhip to return to the fame port. I think the fection only applies to fhips ftill belonging to that port; but if not, I think that the annulling claufe at the foot of fection 16. applies only to the neglect to endorfe the transfer upon the certificate of regiftry within ten days after the fhip's return, otherwife it muft include the neglects in the middle of the fection, viz. by the officers. The 17th fection, as well as the 16th, is a qualification of the 15th fection; the 16th when the fhip is abfent, and the 17th when the owners or either of them are abfent. On what then does the regiftration *de novo* depend? On 7 & 8 *W.* 3. *f.* 21. which is bare of regulations, but has the important one of delivering up the old certificate. This fubject is taken up by the 22d fection of 34 *G.* 3. which hurries fhips home when fold at fea, under circumftances which requires regiftration *de novo* at another port. No link in the hiftory of the fhip is wanting; a perfon enquiring at *Newcaftle* would be referred to *London.* I think the delivery of the copy of the bill of fale of no ufe. The caufes of regiftration *de novo*, are, 1ft, Where the fhip is fold to another port, by the ftat. *W.* 3. 2dly, When the certificate is loft. 3dly, Where the fhip's name is altered. 4thly, Where the certificate is wrongfully withheld from the owner. 5thly, Where a part-owner requires it. I think the *Fifhburn* did what was right. If fhe had done otherwife fhe would not have done enough.

MANSFIELD C. J. I doubt, but think the judgment ought to be affirmed. The ground on which I think fo, is, that no copy of the bill of fale was fent: no queftion of reafonable time for the fending it, arifes in this cafe, becaufe none was fent at all. If the 16th fection had ftopt in the middle, it would have been clear, and the confufion arifes from the latter part, which applies

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plies to a new ſubject, viz. the return of the ſhip to her own port. What is the object of requiring a copy of the bill of ſale to be ſent? To give immediate notoriety to the ſale, and prevent foreigners from trading with *Britiſh* ſhips? It was intended for this purpoſe that the delivery of the copy ſhould be made immediately. The 16th ſection receives conſiderable explanation from the 17th. The 16th applies only to the ſale of a ſhip being at ſea. The 17th contemplates the caſe of a ſale when the owners are abroad. In that caſe it allows 6 months for the delivery of the bill of ſale, and 10 days for the indorſement after the ſhip returns to *any port* in this kingdom. It has been ſuppoſed in argument, that if a ſhip be ſold at ſea, the purchaſer has a right to change her port; and that if he does change her port, a regiſtration *de novo* is ſufficient, and it is unneceſſary to obſerve the requiſitions of the 16th ſection. But how is it to be known whether the purchaſer will change her port? It is, at the time of the ſale, a profound ſecret. My brothers ſeem to think that the purchaſer's reſidence in another port is ſufficient. I think not. If indeed he takes her to that port, and begins to trade to and from thence, then that begins to be her port, and he is compellable to regiſter her there, under 7 & 8 *W.* 3. *ſ.* 21. which in that reſpect I think is in force. The unfathomable intention of the purchaſer to transfer her to another port cannot, I think, be material. I think the purchaſer of a ſhip may carry her to another port and regiſter her there, but then he muſt firſt deliver a copy of the bill of ſale. The 21ſt ſection refers to regiſtrations *de novo* by virtue of the 26 *Geo.* 3., whereas that act authorizes no regiſtration *de novo*. It is ſaid the hiſtory of the ſhip may be traced without a copy of the bill of ſale being ſent: ſome of its hiſtory may be traced, but a ſale may be ſuppreſſed.

Judgment reverſed.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Michaelmas Term,

In the Fifty-first Year of the Reign of GEORGE III.

1810.

AHITBOL v. BENEDETTO.

July 26.

A retainer in a caufe, without a brief, does not authorize counfel to withdraw a record at *nifi prius*.

AT the fittings at *Guildhall*, after *Trinity* term, before *Lawrence* J., this caufe was called on, when no attorney appearing for the Plaintiff, *Shepherd* and *Beft* Serjts. propofed to withdraw the record, which, as they had retainers in the caufe, they conceived they were, on that account, authorized to do.

Lens Serjt., who appeared for the Defendant, contended that a retainer did not authorize counfel thus to take charge of the interefts of the caufe, and that fuch a thing had never been done in any cafe where oppofition was made to it on the part of the Defendant.

LAWRENCE J. could not conceive that a mere retainer authorized a gentleman at the bar to interfere fo far in

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a caufe as to withdraw the record; and by his direction the caufe was called on, a jury were fworn, and the Plaintiff was nonfuited, with liberty to move to fet afide the nonfuit, either in cafe his counfel fhould find that they had had briefs delivered to them, which they had left at home through negligence or miftake, (for which the client ought not to fuffer;) or in cafe the Court fhould be of opinion, that a mere retainer, without a brief, authorized counfel to order a record to be withdrawn.

The Plaintiff did not venture to move this cafe in the enfuing term.

Nov. 6.

SCOTT *v.* GILLMORE.

A bill of exchange, part of the confideration for which is fpirituous liquor fold in lefs quantities than of 20*s.* value, is totally void, though part of the confideration was money lent.

The ftatute 24 *G.* 2. *c.* 40. *f.* 12. making illegal the fale of fpirits in lefs quantities than to 20*s.* value, unlefs paid for, extends to fpirits mixed with water.

THIS was an action brought upon a bill of exchange for 10*l.* 10*s.* 10*d.*, againft the acceptor. Upon the trial of this caufe, at the *Middlefex* fittings after laft *Trinity* term, before *Mansfield* C. J., it appeared that the drawer gave this bill to the keeper of a coffee-houfe in payment for the balance of a debt, part of which was contracted by the loan of fmall fums of money, and part was for fpirits, and fpirits mixed with water, furnifhed by the payee in fmall quantities, not amounting to 20*s.* at one time. It was urged for the Defendant that by the ftat. 24 *G.* 2. *c.* 40. *f.* 12. the Plaintiff could not recover in this action, and *Mansfield* C. J. being of that opinion, nonfuited the Plaintiff.

Shepherd Serjt. now moved to fet afide the nonfuit and have a new trial: he urged that the ftatute does not, in terms, avoid a fecurity given for the price of fpirits fold in fmall quantities; it only fays that no one fhall maintain

tain an action for the price: and at all events part of the consideration for the bill, the money lent, is a good consideration; and where a security is given for a good consideration and a void consideration together, the latter will not avoid the security *in toto*.

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MANSFIELD C. J. The statute does not, in terms, indeed avoid the security, but it makes the consideration illegal, not merely void; and the security is entire, and cannot be apportioned; and since it is partly given for an illegal consideration, the whole bill is void.

HEATH J. Perhaps it might be different, if for part of the amount of the bill there were no consideration.

Rule refused.

THOMPSON *v.* WHITMORE.

Nov. 7.

If a ship hove down on a beach within the tide-way, to repair, be thereby bilged and damaged, it is not a loss occasioned by the perils of the sea.

THIS was an action upon a policy of assurance effected upon the ship *Collingwood*, lost or not lost, at, and from, and to all ports and places whatsoever and wheresoever, at sea and in port, and in all and every service the ship might be ordered, for six calendar months, from the 8th of *February* 1809 to the 7th day of *August* 1810, to return 20*s.* *per* month for every uncommenced month, on being discharged government service. The Plaintiff averred that the ship, by the waves, winds, and perils of the sea, was bilged, strained, broken, and destroyed. Upon the trial of this cause, at the sittings at *Guildhall*, after *Trinity* term 1810, before *Mansfield* C. J., it was proved, that the vessel, which was in the employ of government as a transport, and was a narrow-floored vessel of 244 tons burthen, had, under the direction of

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the officers of the tranſport board, been carefully laid down on *Goſport Beach* to be cleaned and caulked, in a ſituation where veſſels equally narrow-floored, and alſo veſſels of a much greater bulk, therefore much more liable to injury, even of the burthen of 800 tons, had uſually been laid down with ſafety for the ſame purpoſe. The ſhip lay there eaſy on the firſt day, when the tide left her; but ſhe was found on the following day full of water, which roſe in her with the riſing of the circumambient tide: and upon examination it appeared, that the planks of her ſide on which ſhe lay, had given way, and that ſome of her foot-hooks were broken. *Shepherd* Serjt. for the Defendant, objected, that this was not a loſs occaſioned by any perils of the ſea, and cited a caſe of *Rowcroft* v. *Dunſmore*, *B. R.* tried in 1801, before Lord *Kenyon* C. J., in which Lord *Erſkine* was of counſel for the plaintiff: the ſhip was hove down, and while heaving down, ſhe could not bear the ſtrain: ſhe was drawn on the land, where ſhe bilged; and the queſtion was made, whether, it being neceſſary to perform this operation on her, this damage was occaſioned by a peril of the ſea. Lord *Kenyon* thought it was not a loſs by a peril of the ſea, but an accident that happened: ſo in the preſent caſe, whether the ſhip were laid down negligently or not, ſhe bilged: if the blocks that ſupported her had fallen down, that alſo would have been an accident, but certainly would not have been a loſs by perils of the ſea. *Mansfield* C. J. thought, that although the tides knocked away the ſhoars which ſupported the *Collingwood*, and thereby occaſioned the miſchief, and although the ſhip was in the ſervice of government at the time, and not under the control of the Plaintiff, yet as the damage happened upon the land, it could not be conſidered as a loſs ſuſtained by the perils of the ſea, and nonſuited the Plaintiff, with liberty to

 move

move to enter a verdict with 81*l.* 4*s.* damages, if the Court should be of opinion that the Plaintiff was, under the circumstances, entitled to recover.

Lens Serjt. on this day moved to set aside the nonsuit, and enter a verdict for the plaintiff; but

The Court were unanimous that the direction of the Chief Justice was right.

Rule refused.

BUTLER *v.* DORANT.

Nov. 8.

If, upon the judge directing the jury to give nominal damages, the Plaintiff elects to be nonsuited, he will not be permitted to have a new trial upon the ground of a mis-direction of the judge in that point.

THIS was an action of *assumpsit*, on a special agreement, made on the sale of a share in the secret of making *Barclay's antibilious pills*, whereon the Defendant agreed annually to expend 1000*l.* in advertisements; and the breach assigned was, the not having expended that sum. Upon the trial of this cause, at the sittings after *Trinity* term 1810, before *Mansfield* C. J. and a special jury at *Guildhall*, after the parties had closed their respective cases, the Judge was proceeding, in his summing up, to direct the jury that the Plaintiff, not having distinctly proved any special damage arising from the breach, was entitled to nominal damages only; whereupon *Best* Serjt., for the Plaintiff, elected to be nonsuited.

He now moved for a rule *nisi* to set aside the nonsuit and have a new trial, for a mis-direction of the Judge.

LAWRENCE J. His Lordship did not say you should be nonsuited, he directed the jury that you should have nominal

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nominal damages only; but you did not choose to trust your case with the jury. If there were a mis-direction, you should have abided the verdict, and have reserved the objection for a motion for a new trial. I believe this has never been done, that a counsel shall lie by, until he hears the opinion of the Judge at *nisi prius*, and that if he thereupon chooses to be nonsuited, he shall come to the court to set aside his own act.

Rule refused.

Nov. 9.

CROMPTON v. HUTTON.

If two opposite parties require a witness to attend, and he receives payment from both of them, although the payment made by the successful party is afterwards repaid him by the loser, in the taxed costs, the loser cannot recover back the amount from the witness in an action for money had and received.

THIS was an action for money had and received, and money paid. Upon the trial before *Mansfield* C. J. at the *Westminster* sittings after *Trinity* term, the case was, that the plaintiff, having been an unsuccessful candidate for a seat in parliament for *Nottingham*, had petitioned the House of Commons, and had summoned the defendant, who was the town-bailiff, and a material witness, to attend and give evidence upon the hearing of that petition. The sitting members had also summoned the same witness. The plaintiff had, by his agents in town and country, paid the defendant fifteen guineas, and the defendant gave him a receipt, expressing it to be for his loss of time, trouble, and expences, in coming from *Nottingham* to *London* to attend as a witness on that petition, and in returning, eight days. The plaintiff's petition having been voted to be frivolous and vexatious, he was subjected to the payment of the costs of the sitting members, who had paid the Defendant, for his attendance given at their instance, as witness on the same occasion, 17*l*. 0*s*. 9*d*. which sum, amongst other items, was allowed by the officers of the House of Commons in taxing the costs, and was therefore paid to the sitting

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members by the Plaintiff. The Plaintiff conceiving that the Defendant, having altogether received from both parties payment after the rate of 3*l.* 7*s.* 6*d.* *per* day, over and above the expence of carriages, had received more than any witneſs was entitled to claim; and contending that the receipt expreſſed the fifteen guineas to be a full remuneration for all the ſervices which the Defendant had performed for either party in the matter of the petition, he brought this action to recover back the 17*l.* 0*s.* 9*d.*, which was laſt paid to the Defendant. *Mansfield* C. J. thought the Plaintiff was not entitled to recover, and nonſuited him, but with liberty to move for a new trial.

Runnington Serjt. now made the application. If the Plaintiff's agents had known that the Defendant had any claim upon the ſitting members, they would never have paid him ſo much as fifteen guineas. They would have paid him nothing, if they had ſuppoſed he was to receive 17*l.* from the other ſide.

MANSFIELD C. J. It is a very common caſe that a witneſs is ſubpœnaed on both ſides, and that each party pays him; and if he receives ſomething from the one ſide, I ſuppoſe he charges leſs on the other.

HEATH J. You have given no evidence what was the due reward of his ſervices, or that he has charged too much altogether.

CHAMBRE J. The Plaintiff reſts merely on the language of the receipt, but is it not explained? The receipt is not inconſiſtent with the Defendant's having a demand on the other party.

Rule refuſed.

1810.

Nov. 9.

SWINNERTON *v.* Marquis of STAFFORD.

Where the circumstances of a case had been fully put into the possession of a jury, who had twice found a verdict the same way, although there was conflicting evidence, and although the judge who last tried the cause, thought the evidence against the verdict preponderated, the Court refused to grant a second new trial.

IN this case (*a*), upon the second trial before *Lawrence* J. at the *Stafford* summer assizes 1810, a verdict was again found for the Defendant. *Lens* Serjt. now moved for a third trial, upon the ground that the verdict was against the weight of evidence, not only all the former evidence having been confirmed, but an additional fact having been disclosed on the last trial, which was highly favorable to the Plaintiff's claim: viz. that in 1791, notice had been given by a public printed handbill, that on a certain day *Motherfall* common would be driven, and that the freeholders would impound the cattle of all persons not entitled; but that notwithstanding that notice, which was calculated to challenge an assertion of right by all persons who thought themselves entitled, no stock of *Knight*, the then occupier of *Newhouse* farm, the Defendant's estate, was found on the common. He also strongly insisted on the effect of *Knight*'s declaration, who, when *Normacott* common was first inclosed in such a manner as to prevent *Knight* from turning his sheep from this tenement into *Motherfall* common through *Normacott* common, as he had been used to do, remarked that he could now get on neither common; in answer to which, his servant advised him to cut an opening through the corner of the fence of his own farm, abutting on *Motherfall* common, which he accordingly did, and erected a wicket there. [*Lawrence* J. You thought that a cunning trick; I think it an assertion of right; for Lord *Stafford*'s tenants had then long given up all right of common upon *Normacott* common: therefore it was no longer commonable, and the sheep being there must consequently attract attention.]

(*a*) See *ante*, p. 91.

tion.] The whole balance of evidence is so considerably in favor of the Plaintiff, that there ought to be a new trial.

MANSFIELD C. J. I think it is impossible in this case to grant you a rule. Upon the last occasion we went as far as we could go, because it was an important case, and decided the right to the inheritance of this land, which was to be assigned in lieu of common. On the former trial, *Williams* Serjt. strongly insisted to the jury on the grant of common to the priory of *Stone*, whose property afterwards came to Lord *Stafford*, and we thought it might have prejudiced the mind of the jury, though it was rejected; if it had been evidence, it would have been decisive of the matter; but we thought the cause not sufficiently understood, and sent it to a new trial. The jury, who are the competent judges, have again had the case before them, and have decided it. Even if, on nicely scrutinizing all the evidence, we had a doubt whether the verdict was right, it could be never right for us to make no weight of two verdicts of a jury, in order to take the chance of a third.

HEATH J. I am of the same opinion. We cannot grant a new trial without invading the province of the jury. As to the circumstance so much relied on, it might have happened that, at the time of driving the common, the sheep of *Knight* were employed in compestering the fallows. The pinder of *Mothersall*, whose business it is to know every man's cattle, is instructed to impound *Knight*'s cattle, and he never does, which is an argument they had no right to impound.

LAWRENCE J. I cannot say that I should not have been as well pleased if the verdict had been the other way: but the Plaintiff's counsel very forcibly put to the jury

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SWINNERTON *v.* Marquis of STAFFORD.

jury all the arguments which have been this day infifted on: in particular, he obferved, that one inftance of interruption was much ftronger than much uninterrupted exercife of the right, and he dwelt on the inftances of interruption; and in fumming up the evidence, I obferved, that the remarks of the Plaintiff's counfel were very juft and weighty. I confefs I fhould have been as well pleafed if the verdict had been the other way: but fince the verdict is fo, and fince my Lord Chief Juftice and my Brother *Heath* are of opinion that there ought to be a new trial, I may remark, that although the agreement of the prior of *Stone* was rejected as evidence, yet, unlefs it is imputed that this was a fabricated inftrument, it was as near being evidence as could be; and if it had been evidence, it would have bound the rights of the parties, for a perfon who was then owner of *Newhoufe* farm, was a party to that agreement, fo that no injuftice has been done.

CHAMBRE J. I am of the fame opinion. I think there is nothing like fufficient ground for the Court to interfere to fet afide this verdict. The circumftances have already been fufficiently commented on, and therefore I need add nothing.

Rule refufed.

Nov. 12.

ARROWSMITH *v.* INGLE.

Delivery of procefs, fealed up in a letter, in the abfence of the perfon to whom it is addreffed, is no fervice but from the time when the letter is opened.

CLAYTON, Serjt. had obtained a rule *nifi* to fet afide the proceedings in this cafe, for irregularity: the fact was, that the procefs was fent to the houfe of the attorney for the Defendant, fealed up in a letter, which was addreffed to the attorney, and was delivered there before nine o'clock at night; but as the attorney was then abfent

absent from home, and continued absent until after nine o'clock at night, this was not a service before nine o'clock, and was therefore equivalent to no service for that night.

Vaughan Serjt. endeavoured to support this as good service, but,

The Court held that this was no service: if the letter had been open, a clerk might see what were the contents, and proceed in the cause accordingly: but the letter being sealed up, he probably would not dare to open it, and therefore it gave no notice of the action.

Rule absolute.

MORELL v. DUBOST and SONNERAT.

Nov. 12.

It is not sufficient that the defeazance of a warrant of attorney shews the amount of the sum secured by the judgment, it must also notice all collateral securities by which it is secured.

SHEPHERD Serjt. had on a former day moved for a rule *nisi* to set aside the warrant of attorney which had been given in this case, and the judgment entered up, and execution issued and executed thereon, upon the ground of non-compliance with the rule of Court, of *Michaelmas*, 43 *Geo.* 3., which requires, that upon preparing any warrant of attorney, subject to a defeazance, the defeazance shall be written upon the same paper or parchment upon which the warrant of attorney shall be written, or that a memorandum in writing shall be made on such warrant, containing the substance and effect of such defeazance. In the present case the defeazance purported to be merely for avoiding the judgment upon payment of 240*l.*, whereas the transaction, as it appeared on the affidavits, was this: The Defendant *Dubost*, being indebted to the Plaintiff in 240*l.*, a written agreement was entered into, that he, and the other Defendant, should give their acceptances for 240*l.*, and should also deposit in the Plaintiff's hands a valuable picture,

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picture, with power for the Defendant to sell it in case the acceptance should not be duly paid, and to retain the proceeds in part payment of the debt; but the defeazance mentioned nothing of this latter security. The picture had been sold for 160 guineas, and the Plaintiffs had moreover levied in execution 122*l.* 10*s.* The Court granted the rule *nisi*, and engrafted on it the terms, that the Plaintiff should produce the agreement, which was in his custody; that the Court might see how far it corresponded with the defeazance.

Best Serjt. now shewed cause against the rule. He said it was sufficient, if it appeared on the defeazance, as here it did, what was the amount of the debt, and what were the terms on which the Plaintiff was entitled to enter up judgment and sue out execution.

MANSFIELD C. J. No doubt the defeazance ought also to have stated the other part of the agreement, that if the money was not paid at the day stipulated, the picture should be sold, and the proceeds applied in part payment of the debt, and that the judgment should afterwards stand in force for the residue only. The meaning of the rule is the same, as the intent of a part of the annuity act, that it may appear upon what terms the judgment shall be entered up and execution taken out: it is a clear and gross irregularity.

Rule absolute.

Shepherd, in support of the rule.

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WINSTANDLEY *v.* HEAD.

Nov. 12.

To a plea of discharge under an insolvent debtor's act, the Plaintiff replied by denying the truth of all the facts collectively, which were sworn to by the Defendant in the oath which he took, as required by the statute, in order to obtain his discharge, without singling out any in particular: held that although this mode of pleading might be bad on a special demurrer, it did not tender an immaterial issue.

THIS was an action of debt upon a simple contract. The Defendant pleaded first, the general issue, secondly, for a further plea in discharge of the person of the Defendant from any execution to be had against his person in this action, he pleaded his discharge out of the *Fleet* prison, by virtue of the stat. 46 *G.* 3. *c.* 108., intituled an act for the relief of certain insolvent debtors, and that the causes of this action had accrued before his discharge. The Plaintiff replied, that the Defendant, in order to obtain his discharge, in pursuance of the said statute, did, on the occasion in the plea specified, solemnly swear that the schedule then delivered by him, and subscribed, (meaning the schedule required by the said act to be by him in that behalf delivered,) did contain, to the best of his knowledge, remembrance, and belief, a full, just, true, and perfect account and discovery of all the goods, effects, and estates, real and personal, in possession, reversion, remainder, or expectancy, and of every other nature and kind whatsoever, which he, or any person in trust for him, or for his benefit or advantage, were seized, or possessed of, interested in, or entitled to, or was, or were, in his possession, custody, or power, or in the possession, custody, or power of any such person as aforesaid, or which he, or such person had any power of disposing of, or charging for his benefit or advantage at any time since his commitment to prison; and of all debts to him owing, or to any person or persons in trust for him, and of all the securities and contracts whereby any money then was, or should or might thereafter become payable, or any benefit or advantage, which might accrue to him, or to his use, or to any person or persons in trust for him, and the names

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and places of abode of the feveral perfons, from whom fuch debts were due and owing, and of the witneffes who could prove fuch debts or contracts; and that neither he, nor any other perfon or perfons in truft for him, or his ufe, had any lands, money, ftock, or any eftate, real or perfonal, in poffeffion, reverfion, remainder, or expectancy, or of any nature or kind foever, or power of difpofing of, or charging, for his benefit or advantage, other than what were in the faid fchedule contained, except wearing apparel and bedding for himfelf and family, working tools, and neceffary implements for his occupation and calling, together with a fum of money not exceeding 5*l*., and thefe in the whole not exceeding the value of 30*l*. And further, that the faid oath, as fworn and taken by the Defendant, was not true; but was falfe in this, to wit, that the faid fchedule fo fubfcribed and delivered by the Defendant, did not contain to the beft of the Defendant's knowledge, remembrance, and belief, a full, juft, true, and perfect account and difcovery, of all the goods, effects, and eftates, real and perfonal, in poffeffion, reverfion, remainder, or expectancy, and every other nature and kind whatfoever, which he was poffeffed of, interefted in, and entitled to, and which were in his poffeffion, cuftody and power, and which he had power of difpofing of, and charging for his benefit and advantage, at any time fince his commitment to prifon aforefaid; and of all debts to him owing, and to any perfon or perfons in truft for him, and of all the fecurities and contracts, whereby any money then was and thereafter became payable, and every benefit and advantage which might accrue to him, and to his ufe, and the names and places of abode of the feveral perfons from whom fuch debts were due and owing, and of the witneffes that could prove fuch debts and contracts; and that he then had money, ftock, and eftate perfonal, in poffeffion, and in expectancy, other than

than what are in the faid fchedule contained, and over and above wearing apparel, and bedding for himfelf and family, working tools, and neceffary implements for his occupation and calling, together with a fum of money not exceeding 5*l.*, and thefe in the whole not exceeding the value of 30*l.* The Defendant, protefting that the faid replication was wholly infufficient in law, and untrue in fact, rejoined, that he at the time of making and taking the faid oath, or his commitment to prifon, as in the faid replication mentioned, had not money, ftock, or eftate perfonal, in poffeffion, or expectancy, other than what were in the faid fchedule contained, and over and above wearing apparel and bedding for himfelf and family, working tools, and neceffary implements for his occupation and calling, together with a fum of money not exceeding 5*l.*, and thofe in the whole not exceeding the value of 30*l.* in manner and form as the Plaintiff had in his replication alleged. Upon this traverfe, iffue was tendered and joined. Upon the trial of this caufe at a fittings at *Weftminfter*, in *Eafter* term 1810, before *Mansfield* C. J., it appeared that the Defendant was poffeffed of a debt of 3*l.* above the 5*l.* mentioned in this fchedule, and thereupon a verdict was found for the Plaintiff upon this iffue.

Vaughan Serjt. on the following day, by permiffion referved to him at the trial, moved for and obtained a rule *nifi* for fetting it afide, and entering a verdict in favour of the Defendant upon the laft plea, notwithftanding the verdict, and notwithftanding any error that the plea might contain, upon the ground that the replication was bad.

Frere Serjt., in this term, fhewed caufe. The replication is correctly pleaded, inafmuch as it difaffirms the truth

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truth of all the ſeveral allegations of the oath, taken collectively, in the ſame manner in which they are ſworn, it moreover proceeds to particularize property which the Defendant poſſeſſed, and which he did not include in his ſchedule; the Defendant by his rejoinder has denied that he had any ſuch property, and upon iſſue joined hereon, the jury have found that he had ſuch property; a material fact therefore has been put in iſſue, which being found for the Plaintiff, is, according to the ſtatute, deciſive againſt the perſonal diſcharge of the Defendant. There is no ground therefore for the preſent motion.

Vaughan and *Peckwell* Serjts. in ſupport of the rule. The replication is too looſe and general. If the Plaintiff meant to reply ſpecially, he ought to have pointed out by his replication the preciſe facts on which he relied for diſproving the plea. But the queſtion does not ariſe here on a demurrer; the only point is, whether the iſſue be material or immaterial.

MANSFIELD C. J. If there are in the pleading the defects of which you complain, you might have taken advantage of them by a ſpecial demurrer.

LAWRENCE J. The iſſue found by the jury is not an immaterial iſſue: the words of the replication are very general, that the oath was not true; and perhaps if you had demurred ſpecially, for uncertainty, you might have ſucceeded, but you cannot ſucceed on this rule.

The reſt of the Court concurring, the rule was diſcharged.

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MORGAN and Others, Assignees of CHARLES HENRY HUNT, a Bankrupt, *v.* HORSEMAN and Others.

A deed whereby a debtor, being pressed, conveys estates in trust to sell, and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy, is an act of bankruptcy.

But the deed is valid, so far as relates to the protection of the urgent creditor.

Whether void for the residue, *quære.*

Upon a case directed out of Chancery, the Court will not solve any questions that are not expressly put in the case.

THIS was a case directed by order of the Lord Chancellor, for the opinion of this Court; the question put, was, whether an indenture executed by *Charles Henry Hunt*, was an act of bankruptcy. The deed was executed on the 4th of *July* 1797, and was made between the bankrupt *Hunt*, of the one part, and the Defendants *Edward Horseman*, *Edmund Battersbee*, *John Horseman*, and *Thomas Hunt*, of the other part; and recited that *C. H. Hunt* being indebted to the Defendants, and to divers other persons, in different sums of money upon mortgage, and being also indebted unto the Defendants in 6000*l.* and upwards, for bills, drafts, or promissory notes in their possession, unpaid; and being also indebted to his mother *Catherine Hunt*, and his sister *Catherine Maria Hunt*, in 1000*l.*, for money lent and advanced; and being desirous that those respective sums might be paid, had proposed to the Defendants, in consideration of the money due to them, and of their delivering up to him the said bills, drafts, and notes, to the amount of the said sum of 6000*l.*, and also in consideration of the name of the said *Thomas Hunt*, (who was the brother of the said *C. H. Hunt*,) being erased from the bills or notes then in the possession of the said *Horseman*, *Battersbee*, and *Horseman*, (who were at that time bankers at *Stratford-upon-Avon*,) to convey and assure unto them, and the said *T. Hunt*, and their heirs, the hereditaments thereinafter mentioned, upon the trusts thereinafter expressed; and for the considerations aforesaid, the said *C. H. Hunt* did thereby convey and assure unto the Defendants and their heirs, the manors, lands, and

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and hereditaments therein mentioned, in the counties of *Worcester* and *Warwick*, upon trust that the Defendants, or the survivors or survivor of them, or his heirs, should, as soon as conveniently might be, absolutely sell and dispose of the same; and should, until such sale, receive and take the rents thereof; and out of the monies to arise by such sale, and by the rents and profits, should pay off and discharge the several sums of money due and owing from the said *C.H.Hunt* to the several persons therein mentioned, and that after payment thereof, the Defendants should retain to themselves, out of the purchase money, a sum of 10,000*l.*, and interest, in the said indenture mentioned to be due to them upon mortgage, and also the sum of 6000*l.*; due to them for principal and interest, upon the bills, drafts, and promissory notes, in their custody; and likewise the sum of 1000*l.* to his mother *C. Hunt*, and his sister *C. M. Hunt*, and that they should deliver up to him the said *C. H. Hunt*, the same bills, drafts, or promissory notes, so erased as aforesaid; and after payment of, and retaining the respective sums of money in the said indenture mentioned, should pay the residue of such trust monies unto the said *C. H. Hunt*, his heirs, executors, administrators, and assigns. The provision in the deed in favour of *Horseman* and *Battersbee*, was made fairly, in consequence of their pressure, and from fear of hostile measures being pursued by them; but the other provisions in favour of the mother, of the brother, and of the sister, were voluntary, and made by the said *C. H. Hunt*, to give them a preference in contemplation of bankruptcy, and were fraudnlent.

Vaughan Serjt., for the Plaintiffs, contended that this was an act of bankruptcy for two reasons; first, that it was such upon the plain letter of the statute 2., *vulgo* 1. *Jac.* 1. *c.* 15. *s.* 2.; secondly, that it was such upon the general policy of the bankrupt laws, as a fraud

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upon all the other creditors. First, it was a fraudulent grant or conveyance of the bankrupt's lands and tenements, to the intent, or whereby, his creditors should or might be defeated or delayed. If it be to the intent, it is sufficient, it is not necessary that creditors should be thereby actually delayed. Nor is it now held necessary that it should be a conveyance of all the bankrupt's property. [*Mansfield* C. J. agreed that though in *Wilson* v. *Day*, 2 *Burr*. 831., the Court countenanced the idea that nothing but an assignment of the whole would be deemed an act of bankruptcy, that was not now held a necessary ingredient.] Any act under seal, whereby a part of the creditors are to be excluded, is now held an act of bankruptcy. *Linton* v. *Bartlett*, 3 *Wils*. 47. is cited in the case of *Rust* v. *Cooper*, *Cowp*. 633. by Lord *Mansfield* C. J. as a decision in which "a conveyance of a third part of the bankrupt's effects "only, and a fair transaction with the party, was held "to be fraudulent and void, as against the rest of the "creditors, and that being by deed, it was itself "an act of bankruptcy." [*Mansfield* C. J. stopped him, observing that it was unnecessary to cite cases to shew that every deed of assignment of part of a man's property, whereby his creditors may be defeated or delayed, is an act of bankruptcy.]

Rough Serjt. was called upon to argue for the Defendants. He admitted the law to be such as contended for, but said that the object of this case was to raise a further question. The matter arose upon a bill filed against the Defendants to have this deed delivered up to the Plaintiffs to be cancelled; but since the case itself expresly states that the first provision in the deed, in favour of *Horseman* and *Battersbee*, was not fraudulent, they were entitled to retain the custody of this deed

for their own benefit and protection. Deeds void as to certain provisions, because those provisions are repugnant to a statute, have been supported as to other uses; *Kerrison* v. *Cole*, 8 *East*, 231. And Lord *Ellenborough* C. J. there praises the case of *Mowys* v. *Leake*, 8 *T. R.* 411., which decided the same point with respect to a deed void under the stat. 13 *Eliz.* *c.* 20., as being founded on admirable good sense and sound law. From *Twyne's case*, 3 *Co.* 80. downwards, there has been no case exactly parallel to this. Where the primary purpose of a deed has been fraudulent, though coupled with an honest trust, the trust has not prevailed to give effect to the deed, but the primary purpose of this deed is correct, and the fraudulent provisions are added without the knowledge of *Horseman* and *Battersbee*. [*Lawrence* J. You are labouring that which is clearly in your favour, that with respect to *Horseman* and *Battersbee*, the deed shall stand as a fair deed; but is not your point this, that the fairness of the deed as to them, obliterates the fraud of the other provisions?] *Bacon's Maxims*, *Reg.* 22. *p.* 98.: *non videtur consensum retinuisse, si quis ex præscripto minantis aliquid immutavit.* Here the bankrupt, being pressed by *Horseman*, says, I will give you the deed which you ask, but you must let me insert a provision for my relatives. If one is urged under duress to give a bond for 50*l.*, and says, no, I will not give that, but I will give a bond for 20*l.*, the bond for 20*l.* is still given under the same duress. *Bac. Max.* 98. *Mowys* v. *Leake* is strong for this construction. [*Lawrence* J. That case amounted only to this, that on the annuity act, the Court had no authority to direct the deeds to be delivered up.] It established thus much, that a deed void by statute may be void in part only. [*Lawrence* J. That is contrary to the doctrine of *Collins* v. *Blantern*, 2 *Wils.* 351., where *Wilmot* C. J. fol-

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lowing, *Hobart*, likens the ſtatute to "a tyrant, where "he comes, he makes all void; but the common-law," he ſays, "is like a nurſing father, makes only void that "part where the fault is, and preſerves the reſt."]

MANSFIELD C. J. It is impoſſible for this Court to look at any thing but the caſe referred to it by the Court of Chancery; and it has no authority to give any opinion on any thing but the queſtion put by the Lord Chancellor; therefore, as to the queſtion laſt raiſed, we have no authority to give any opinion. The queſtion put to us, is, whether this is an act of bankruptcy; a conveyance, either of all, or part of a man's property, in favour of fewer than all the creditors, is an act of bankruptcy, becauſe it is the means whereby the creditors may be defeated or delayed. This deed is an aſſignment of the grantor's real eſtates in two counties, *Worceſter* and *Warwick*, to the Defendants, in truſt, to ſell, and out of the proceeds, after payment of certain debts, due to others and themſelves, to pay the grantor's mother and ſiſter, each 1000*l*. Is not this then a gift of eſtates to the value of 1000*l*., to each of theſe perſons, the mother and ſiſter, to ſatisfy their claims and pay their debts, and ſo put thoſe ſums out of the reach of all other creditors? It is impoſſible therefore to ſay that this not an act of bankruptcy. As to the queſtion what may be the effect of theſe proviſions on the rights of the *bonâ fidê* purchaſers under this deed, we have no authority to enquire, it may be a very proper point for the Lord Chancellor to conſider either in law or in equity, but we have no authority whatſoever to conſider it.

The following certificate was afterwards ſent to the Lord Chancellor.

Having heard the arguments of counſel upon this caſe, we are of opinion that the indenture of the 4th of *July*

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1797, executed by the said *Charles Henry Hunt*, was an act of bankruptcy.

J. MANSFIELD.
J. HEATH.
S. LAWRENCE.
A. CHAMBRE.

Nov. 15.

SMITH *v.* SPOONER.

In an action for slander of title it is necessary for the Plaintiff to prove malice in the Defendant.

A lease, in which was a proviso for re-entry if the rent were arrear 28 days, being exposed to sale by the assignee, and rent being then in arrear, the lessor announced at the sale that the vendors could not make a title, in consequence of which, bidders, who came to buy, went away. He afterwards offered 100*l.* for the lease, but subsequently recovered the premises in ejectment: held that no action for slander of title lay against him.

If the lessee covenant, that if the rent be unpaid 28 days, the lessor may re-enter, whether a demand of rent be first necessary, *quære*.

In an action for slander of title, the Defendant may give evidence on the general issue, that he spoke the words claiming title in himself.

THIS was an action upon the case for slander of title. The Plaintiff in his declaration, in substance, averred, that he was possessed of a house for 24 years, the residue of a term of 31 years, under a demise from the Defendant to *Francklin*, and an assignment made on the 31st of *August* 1809, from *Francklin* to the Defendant: that the Plaintiff put up the residue of his term to sale by auction: that the Defendant was present, and declared that the Plaintiff could give no title if he did sell the property, and averred a special damage sustained thereby. The Defendant pleaded the general issue. Upon the trial of this cause at the sittings after *Easter* term 1810, before *Chambre* J. at *Westminster*, the lease was given in evidence: it contained a proviso for re-entry in case the rent, which was payable quarterly, should be behind and unpaid for 28 days after either of the days of payment. It was proved that the Plaintiff, in the month of *August* 1809, exposed to sale by auction his unexpired term in the premises, and that at the time of the sale, when this lot was put up, the Defendant was present, and told the auctioneer it was of no use to sell the lot, or put it up; the house was his own, he was the landlord of it, and

no title could be made to it. Some other persons were there present, who said, they had come to bid for this lot, but rather than involve themselves in a lawsuit, they would go away without bidding for it. The auctioneer and the Defendant then went into another room, where the Defendant said he would buy the house; he offered 100*l.* for the lease: but the auctioneer said he had no authority to sell it otherwise than by public auction. The Defendant had, two or three weeks before the auction, applied to the auctioneer for the purchase of the lease. The auctioneer told the Defendant he thought he was liable to the expences of the auction, to which he answered, that he would rather pay ten pounds than that the Plaintiff should sustain any injury. The expences of the sale amounted to 6*l.* 8*s.* At that time there was half a year's rent due and in arrear, and certain parts of the premises were out of repair, and the Defendant had complained of it: at the time of the trial the Defendant was in possession of the premises, and it was proved that the Plaintiff's attorney had recently, in the month of *May* preceding, tendered the Defendant the payment of five quarters of a year's rent, which was in arrear, and the costs of the ejectment under which he had obtained possession of the premises, if the Defendant would give back the possession. The declaration in ejectment had been served upon *Francklin* only, and not upon the tenant in possession; the house being at the time of the service shut up and uninhabited. *Best* Serjt. for the Defendant, objected that the Plaintiff could not recover upon this evidence, because there was no proof of malice in the Defendant, and according to the case of *Hargrave* v. *Le Breton*, 4 *Burr.* 2422, in order to support this species of action, there must be proof of malice, either express or implied. 4 *Co.* 18. *Sir G. Gerard* v. *Mary Dickenson*, 1st ref. "If the Defendant had

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affirmed that the Plaintiff had no right to the castle and manor of *H.*, but that she herself had right to them, in that case, because the Defendant herself pretends right to them, although in truth she had none, yet no action lies. For if an action should lie when the Defendant herself claims an interest, how can any make claim or title to any land, or begin any suit, or seek advice or counsel, but he should be subject to an action? which would be inconvenient." Here, although in fact no re-entry was given by the lease, upon the ground of the premises being out of repair, yet it is very probable that the Defendant, who, it seems, complained of that defect, supposed that a re-entry was thereupon given, and if he so thought, that alone would be sufficient to repel the inference of malice: and if that had been indeed a breach of condition, the Plaintiff could not have obtained relief, even in a court of equity, to re-establish his title to the lease. The rent, however, was in arrear at the time of the sale, which is proved by the Plaintiff's offer of paying the rent with the costs of the ejectment: whether the Defendant has obtained a regular judgment in ejectment or not is immaterial, for inasmuch as the rent was in arrear, the title of re-entry had accrued to the Defendant, which sufficiently bore him out in saying that the Plaintiff had no right to sell. *Pell* Serjt., for the Plaintiff, urged, that if a person is about to sell property, and another, by any means whatsoever, impedes him in selling it, an action lies. The opposite principle contended for goes so far, that if one person were about to sell a chattel, as a horse, another might with impunity charge the seller with felony, in having stolen the horse, if he only took care at the same time to claim the horse as his own, although he had no property in it whatever. *Chambre J.* was of opinion that words of this sort must be proved to be

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spoken either through express malice, or under circumstances from which malice may be implied; and he thought there were some circumstances here which rendered it improper to withdraw the case from the consideration of the jury. He directed the jury that any man who has, or supposes he has, a title to an estate, may assert his own title, unless malice is proved to have been his motive. Some of these circumstances were rather suspicious; it did not appear that until the Defendant had quitted the auction room, he said any thing about his own right; he only denied the Plaintiff's right to sell; and it seemed something like an admission of the Plaintiff's right, that he had offered a sum for the purchase of the lease: it appeared, however, that a re-entry was given upon the non-payment of rent, and that the rent had been in arrear, wherefore, the whole of the evidence, taken together, disaffirmed the idea of malice. It was moreover observable, that by the form of the condition used in this lease, it was not necessary to demand the rent in case of a re-entry; it was not like those leases in which the re-entry is given 28 days after demand made, but the re-entry here was given in case the rent should in any event be in arrear by the space of 28 days. Liberty was reserved to the Defendant to take the benefit of his objection, by moving to enter a nonsuit, in case the verdict should pass for the Plaintiff. The jury found a verdict for the Plaintiff, with *6l.* 8*s.* damages.

Best Serjt. in the following term obtained a rule *nisi* to set aside the verdict and enter a nonsuit, upon the ground that at the time of the sale there was rent arrear, and no express malice proved, and that where a Defendant has even a colour of title, this sort of action cannot be supported; upon which occasion *Mansfield* C. J. asked, inasmuch as there was rent arrear, how a man could

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could ſuffer damage by ſlander of title, who had no title; and *Chambre* J. ſaid, that after the trial, when he found how obſtinate the jury were, he had repented that he had not nonſuited the Plaintiff: but at firſt he thought there was ſome ſhew of malice, ſince the Defendant had firſt endeavoured to purchaſe the leaſe, and after the ſale had offered to purchaſe it at a lower rate; nevertheleſs that he was afterwards convinced that thoſe grounds were inſufficient.

Frere Serjt. (*Pell*, who was with him, being confined by illneſs,) now ſhewed cauſe. He contended that the Defendant's treaty with the Plaintiff for the purchaſe of the leaſe was a waiver of all forfeitures that might have been previouſly incurred; (but *Mansfield* C. J. held that a man may well offer a ſmall ſum for that which is his own, rather than incur the trouble of going to trial to recover it.) If the Defendant aſſerts that the Plaintiff has no title, the *onus* lies upon him to prove it. And the only proof given is, of a flaw in the Plaintiff's title at the time of the action brought, not of the words ſpoken: at the time of the act complained of, the Plaintiff had the poſſeſſion of the premiſes, and poſſeſſion is a ſufficient title againſt a wrong-doer. [*Mansfield* C. J. A pretty ſtrong preſumption muſt be made, to enable you to avail yourſelf of that argument; for until it is firſt ſhewn that the Plaintiff had a title, the Defendant is not a wrong-doer.] The Defendant is not entitled to avail himſelf of the anſwer that he claims title in himſelf, under the plea of the general iſſue which he has pleaded. That plea is, that he did not uſe the expreſſions, whereas his anſwer ought to have been, that the ſtatement made is true, that the Plaintiff had no title. This ſpecies of action is of rare occurrence: but in all other caſes of ſlander it is of daily practice, that if the Defendant juſtifies the ſlander, he muſt ſpecially plead

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his justification. [*Lawrence* J. Was not the plea in *Hargrave* v. *Le Breton* the general iſſue, in which the like defence prevailed?] There the circumſtances were very different: the Defendant explained his whole objection to the title; here the Defendant only throws out a dark innuendo, and never ſhews what his title was. [*Lawrence* J. referred to the caſe of *Sir G. Gerard* v. *Mary Dickenſon.*] In *Cro. El.* 196. the declaration in the ſame caſe is reported, and it charges no malice, yet the Plaintiff ſucceeded, although the Defendant made a claim of right. Therefore it is not true that no action is maintainable where the Defendant claims an intereſt. [*Mansfield* C. J. That poſition may not perhaps be ſupported to the full extent: if a man knows that he has not a title, and maliciouſly aſſerts that he has, perhaps it would not ſerve; but where there is a *bonâ fide* aſſertion of title, it is ſufficient.] There was no proof of any demand of rent, nor of any re-entry having been made before the ſale: without a demand on the 28th day, the Defendant had no title of re-entry, conſequently the Plaintiff's title was at that time good. *Doe d. Forſter* v. *Wandlaſs*, 7 *T. R.* 117. For this proviſo does not make the leaſe abſolutely void upon the non-payment of the rent, it only gives a power of re-entry, and in order to exerciſe that, all the formalities of a demand on the 28th day, and of a re-entry, muſt be previouſly obſerved. [*Mansfield* C. J., and *Heath* and *Chambre* Juſtices, denied this. *Chambre*. If the proviſo made the leaſe actually void, ſome ſort of re-entry would be equally neceſſary to indicate the leſſor's will to determine it.] *Duppa* v. *Mayo*, 1 *Williams's Saunders*, 287. *note* 16.; all the authorities are there collected. [*Mansfield* C. J. You need not labour that point, that in the caſe of a re-entry upon condition for non-payment of rent according to the reddendum, a demand and ſeveral other formalities are neceſſary. Thoſe points are all perfectly well known,

and

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and laid down, *Co. Litt.* 201. *Lawrence* J. adhered to the doctrine of *Doe* v. *Wandlass*, that a demand was necessary here.] The statute 4 *Geo.* 2., it is true, dispenses with these formalities, but the Defendant has not brought himself within that statute; and the words of that act confirm the doctrine, that at common law both a demand and re-entry are necessary. [*Lawrence* J. Re-entry is now necessary in no case but to avoid a fine.] Even if the proviso had been that the lease should be absolutely null and void, a demand of the rent would have been necessary: so a rent *in nomine pœnæ* cannot be enforced until a demand of the original reserved rent has been made. 1 *Ro. Ab.* 459. *Co. Litt.* 202. *a.* [*Mansfield* C. J. Lord *Kenyon* C. J. certainly lays it down very unreservedly in *Doe* v. *Wandlass*, that on a proviso for re-entry, there must be a demand and all the formalities attendant upon a condition broken; but the common import of these words is, that "if I do not pay you your rent within the 28 days, you shall re-enter:" and within the 28 days the tenant must find out his landlord, though he be 200 miles off, if he is within the four seas, and pay him his rent, otherwise his estate is voidable: but I do not think the case turns upon this point, nor do I agree that the *onus* of proof is on the Defendant.] Next, admitting that the Defendant could justify some slander, he cannot justify the terms he has made use of. *Cro. El.* 427. *pl.* 28. *Pennyman* v. *Rabanks*. *S. C. Mo.* 410. *pl.* 558. The words spoken upon a sale were, "I know one that hath two leases of his land, who will not part with them at any reasonable rate;" and the Defendant justified by reason of leases made to himself, and upon verdict for the Plaintiff, and motion in arrest of judgment, the Court held the plea bad. So *Earl of Northumberland* v. *Byrt*, *Cro. Jac.* 163. The Plaintiff declared that the Defendant said, "The late Earl of *Arundel*, lord of the manor of *Hazelbert Brian*, did make

a lease

a lease of my tenement in *Hazelbert* to one Mr. *Stoughton* for 60 years, to begin after the expiration of my customary estate, &c. and the same is a good lease;" *ubi reverâ*, the said Earl of *Arundel* did not make any such lease. This Defendant justified, that the Earl made such a lease, and that *Stoughton* assigned to the Defendant, wherefore, for maintenance of his title he spoke these words. Upon a replication, *de injuriâ suâ propriâ*, and issue joined thereon, a verdict was found for the Plaintiff; and it was moved in arrest of judgment, upon the ground that he justifying the words by reason of the assignment of the lease, and in maintenance of his own title, an action lay not: *sed non allocatur*: for in his words he doth shew that he spake them for himself, and in maintenance of his own title; for it is lawful for every one to speak in countenance and maintenance of the title which he claims: but the words in themselves import that he spake them to countenance the title and interest of a stranger, which is not lawful. And now, when he is sued to be punished for them, (they being false as is pretended,) he cannot excuse himself by entitling himself, when the words did not at first import as much." [All the Court agreed, that in both of these cases the pleas were no otherwise bad, than because they were false, and not consonant to the facts; so that the issues were properly found against the Defendants.] The reasons there given are good, and are founded on good sense, and in this case, if the lessor had explained the grounds on which he conceived himself entitled to re-enter, the auctioneer, who exposed the premises to sale upon the terms of the vendor's clearing off all incumbrances to *Michaelmas* 1809, would immediately have healed the defect of title, by tendering to the Defendant his rent up to the time of the sale, and the costs of the ejectment; after which the title of the vendor would have been good again. *Mildmay's* case, 1 *Rep.*

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177. it was held that an action might be maintained for insisting on that as a lease, which was so doubtful, that the Court hesitated whether it were a lease or not. That indeed was the case of words spoken by a person not interested in the property. In *Hargrave* v *Le Breton*, the Court thought that the weight of the evidence disaffirmed the presumption of malice: but this Defendant, so far from going to prevent the lease from being sold, goes with an intention to purchase it himself, and offers 100*l*., an inferior consideration, for that which he knew to be of value. The question of malice has been submitted to the jury, and they have affirmed it.

Best Serjt., *contrà*, was stopped by the Court.

MANSFIELD C. J. The ground of this action is, that the Defendant is supposed falsely and maliciously to slander the title of the Plaintiff. Here is an auction, and the Plaintiff's estate is put up; it does not appear whether the Plaintiff was present: the auctioneer, as agent for the vendor, probably knew something of the estate: the Defendant says, the Plaintiff cannot make a title; the auctioneer asks no questions; if he had asked, and the other had affirmed something false, it might have been different: it does not appear how the persons came to disperse; for, generally, persons attending a sale would not disperse on the word of a stranger; but it was said by the counsel that there were only two or three persons there present. At the time of the trial, the Defendant was in possession of the premises; but it does not appear how; the Plaintiff however knew how, and might have explained it by evidence, and except for the lease, upon which the Plaintiff was entitled to equitable relief, the Defendant had then, in fact, as good a title as he had before he had demised. Stopping here then, what evidence is there of malice? What evidence that

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the Plaintiff meant any thing more than to assert his right to that possession, which he afterwards obtained before the cause was tried? On the part of the Plaintiff it was said, the Defendant ought to prove his title: that is not necessary; for pretty strong cases say, that if a Defendant says *he* has title to an estate, no action will lie against *him*, therefore it cannot be incumbent on him to prove his title. But it is objected, that supposing this was a case where a claim of title in the Defendant might be a ground of defence, yet he cannot give it in evidence on a plea of the general issue. That however is directly opposite to the case of *Hargrave* v. *Le Breton*, where the general issue was pleaded: but, according to common sense, it cannot be necessary to plead specially. He alledges that the Defendant has slandered his title maliciously; if he had no title, he had nothing to be slandered. The slander also must be malicious, and what proof of malice is here? I think the rule must be made absolute for a nonsuit.

HEATH J. I am of the same opinion. There is no pretence of express malice, and as little proof of implied malice.

LAWRENCE J. I am of the same opinion. An action can only be maintained where the words are spoken maliciously. It is not necessary to plead specially, it is for the Plaintiff to prove malice, which is the gist of the action, and is a part of the declaration important to be proved by the Plaintiff. The specially pleading a justification would admit the facts stated in the declaration, and amongst others the malice. Now as to the facts, what is this case? A man thinking he has a right to recover possession of a term for some misconduct of his tenant, and hearing the term is to be sold, goes to the auction, and says, the vendor cannot make a title; now does

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does not he act herein as an honest man? What would have been said, if he had lain by, and permitted another to purchase it, before he disclosed his claim? The rule therefore must be made absolute for a nonsuit.

CHAMBRE J. concurring,

The Rule was made Absolute.

Nov. 21.

DAWSON v. WOOD and Others.

The Plaintiff having purchased a public house, for which he could not himself obtain a licence, because he resided in another tavern, put *B.* an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the licence, which was granted to *B.* Held that the sheriff was not entitled to take, under an execution against *B.*, the Plaintiff's liquors and chattels in the house, committed to *B.*'s custody.

THIS was an action of trespass, brought against the sheriffs of *London*, their officers, and the Plaintiff, in an execution against *Pyke*, for taking the liquors and effects in the *Pitt's Head* public-house in the *Old Bailey*, and detaining them until they compelled the Plaintiff to pay 66*l.* 13*s.* to procure their liberation. Upon this trial at the sittings after the last *Trinity* term at *Guildhall*, before *Mansfield* C. J., it appeared that the Plaintiff had purchased the lease and fixtures of this house by appraisement from *Vinall*, a former tenant, that the Plaintiff now paid the rent for it to his landlord, who was a brewer, and supplied him with beer, the money for which he received of the Plaintiff at another tavern, which he kept in *Mitre-Court*: that the Plaintiff also purchased all the liquors and provisions that were consumed in the house; and that all the tradesmen who furnished any part thereof, gave credit to him alone. It was proved to be the practice among the city magistrates, not to grant a licence to any person to sell beer at any house at which he did not reside, and not to grant two licences to the same person to sell beer at two public-houses within the same ward of the city; in consequence of which rules, the Plaintiff, who had another public-house within the same ward wherein this

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houſe ſtood, cauſed *Pyke* to take out the beer licence in his own name, and ſupplied him with money for that purpoſe: the beer licence had before the preſent year been taken out in the name of *Hindley*, who was a waiter of the Plaintiff's at his tavern in *Mitre-Court*, and who then reſided in this houſe, but did not keep houſe on his own account: and the wine and ſpirit licences granted to *Hindley* for this houſe were ſtill in force at the time of the execution levied, and his name then ſtill continued on the door. *Pyke*, who had then lately been diſcharged out of the *Fleet* priſon under an inſolvent act, was put into the houſe by the Plaintiff to manage it; he ſlept there, he had no wages, but a mere ſubſiſtence; he paid the taxes, and the brewer's demands for beer, with money taken out of the till on the Plaintiff's account. All the ſurplus of the money received from the ſale of liquors, after defraying neceſſary expences, was paid over by *Pyke* to the Plaintiff. The Defendants took the goods in execution under a judgment for a debt due from *Pyke* before his diſcharge, but reſtored them on payment by the Plaintiff of the debt and coſts, amounting to 66*l.* 13*s.* *Mansfield* C. J. thought, that though the Plaintiff furniſhed the money for carrying on the buſineſs, the liquors and beer machines taken were yet to be conſidered as the ſtock in trade of *Pyke*, who was carrying on this trade; and that if this were not ſo, a fraud would be ſucceſsfully practiſed on the police and the juſtice of the country, which had no ſecurity from the perſon from whom they ought to have it, for the good keeping of this houſe, and alſo a fraud upon every perſon who dealt with *Pyke*, by giving him an appearance of poſſeſſing property: and as there was not in this caſe the queſtion to be left to the jury which uſually ariſes, whether a fraud had been practiſed on any creditor, he nonſuited the Plaintiff.

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Best Serjt. having on a former day in this term obtained a rule *nisi* for setting aside the nonsuit, and entering a verdict for the Plaintiff for 66*l.* 13*s.* damages;

Cockell Serjt. shewed cause. He contended that inasmuch as it appeared that the Plaintiff lent *Pyke* the money to procure the licence, this was a case of gross fraud: and he argued that it was similar to the case of *Lingham* v. *Biggs*, 1 *Bos.* & *Pull.* 82. [*Heath* and *Lawrence*, Justices, both observed that the case cited arose on the statute 21 *Jac.* 1. *c.* 19. *s.* 11.] The Plaintiff has lent himself to a fraud in order to cheat *Pyke*'s creditors, by making them suppose that the goods belonged to *Pyke*, and he is now estopped from saying that they are not *Pyke*'s.

Best and *Vaughan* Serjts. contrà. Even supposing it were the general law, instead of a mere regulation of the magistrates, that the person licensed must live in the house, it does not follow that the consequence of the infraction of the law is the forfeiture of all the property which is put into the house, a consequence which would seriously affect many persons who put personal property of great value into hotels, in *London*, and elsewhere, in which they do not themselves live. The visible possession of goods is not sufficient to justify a caption: the sheriff takes them at his peril: if that were sufficient, the statute of 21 *Jac.* would have been unnecessary. It is, besides, a very different case, whether the former owner of goods, after selling them, even for a valuable consideration, still retains the possession, or whether an owner originally having, and still retaining the property of the goods, commits the custody of them to another: and from *Twyne's case*, 3 *Co.* 80. downwards, it has never been held that the putting a man into possession of

goods

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goods which were not originally his, makes them a fund for payment of his debts; and as for obtaining for him a falſe credit by the means of ſuch poſſeſſion, the name which ſtands upon the door of the houſe, which is not *Pyke*, but *Hindley*, could not miſlead the Defendants into this error; and even all the licences, except the beer licence, (which was obtained in *Pyke*'s name only four days before the execution levied, and therefore could not be notorious,) are ſtill granted in *Hindley*'s name: any one of the tradeſmen who ſerve the houſe, and who all give credit to the Plaintiff, not to *Pyke*, would, upon enquiry, have told the Defendants that theſe were the goods, not of *Pyke*, but of the Plaintiff, whoſe houſe only this muſt be laid to be, in an indictment in caſe of burglary. It was not the poſſeſſion of the goods that induced the Plaintiff in the execution, to give credit to *Pyke*, for the debt ſubſiſted three years before. It was never left to the jury whether this were any ſhift or contrivance to cauſe *Pyke* to be conſidered as the owner of theſe goods.

MANSFIELD C. J. I thought at the trial that the conduct of the Plaintiff had not left it in his power to ſay, as to the creditors of *Pyke*, that *Pyke* was not the real owner of theſe goods. It was nonſenſe to talk of the goods being lent, for the goods were to be conſumed, not to be returned, therefore it was the ſame thing as the Plaintiff's telling the world, or at leaſt the magiſtrates, that *Pyke* was the perſon legally entitled. The Plaintiff is the actual procurer of this licence, and furniſhes money for it, and it ſeemed to me to ſtop the plaintiff's mouth, and to put it out of his power to ſay, theſe were not *Pyke*'s goods. I find my learned Brothers are of a different opinion. I defer to their authority, but cannot ſay I think otherwiſe.

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HEATH J. I cannot agree with my Lord, it is not sufficient that *Pyke* is the oftensible owner of the goods if so, there would have been no need of the ftat. 21 *Jac* 1., and fo to hold, would be extending that ftatute to all other cafes as well as bankruptcy. The cafe of *Cadogan* v. *Kennet*, *Cowp.* 434., and the other cafes in the King's Bench, are very diftinguifhable from this.

LAWRENCE J. In the cafe of *Hafelinton* v. *Gill*, 3 *T. R.* 620., where cows were bought and fettled on the wife, it was held that they were not liable to an execution for the hufband's debts. If there is any thing in this cafe, it would be the argument that the poffeffion of the goods gives *Pyke* a falfe credit; but the fame argument would hold wherever goods have been lent; and it has never yet been held, (unlefs where, as in *Twynes*'s cafe, the original owner has fold goods and retained the poffeffion, and except in cafes of bankruptcy, on the ftatute 21 *Jac.* 1.,) that a perfon may not give the poffeffion of his goods to another. It would be of very great importance, for many trades are carried on by oftenfible perfons, where others are behind, who do not appear; and it has never yet been held, except in cafes of bankruptcy, that they are liable for the debts of their fervants.

CHAMBRE J. I am of the fame opinion. The ftatute of 21 *Jac.* 1. would never have been made, if the law had been fo. I am of opinion with my two Brothers who fpoke laft, and it would be extending the provifions of that ftatute much farther than has been hitherto done, to apply it to this cafe.

Rule abfolute for entering a verdict for the Plaintiff, for 66*l.* 13*s.*

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OULDS and Others *v.* SANSOM.

Nov. 22.

Feme covert cannot make an attorney.

THIS was a writ of right. The demandants, three coheireſſes, femes covert, ſuing without their huſbands, by their attorney, demanded certain premiſes in *Leighton, Eſſex.* They counted upon the ſeiſin of *Mary Lewis*, and averred that, upon her death, for that ſhe died without iſſue of her body, the right deſcended to *John Spriggs*, father of the demandants, who was couſin and heir of the ſaid *Mary*, and further derived title to themſelves from him. The tenant demurred ſpecially, for that it was not expreſsly and poſitively averred and ſhewn how *John Spriggs* was couſin and heir of *Mary Lewis*, but only argumentatively, whereas the couſinage of the ſaid *John* to the ſaid *Mary*, ought to have been directly and expreſsly ſhewn by the count.

Beſt Serjt. in ſupport of the demurrer, took a preliminary objection, that femes covert could not make an attorney.

Shepherd Serj. admitted he could not anſwer this objection.

LAWRENCE J. It is matter in abatement of the writ. The judgment muſt be *quod breve caſſetur.*

Judgment for the tenant.

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Nov. 23.

Mayor of DONCASTER *v.* DAY.

What a dead witneſs has ſworn on a former trial between the ſame parties, is evidence in the cauſe, and may either be read from the Judge's notes, or proved upon oath by the notes or recollection of any perſon who heard it.

THIS was an action of treſpaſs, brought by the mayor and corporation of *Doncaſter*, to try whether the public had a right to paſs with goods from ſhips lying in their river, over a bank at a place called *Docking-Hill*, which the Plaintiffs claimed to be their ſoil and freehold, in order to cart the goods upon a highway lying beyond the bank, and parallel to the river: the ſame Plaintiffs had commenced other actions for the like cauſe, againſt other Defendants. They had proceeded to trial in this cauſe; and the verdict being adverſe to the corporation, and repugnant to the weight of evidence, upon an application for a new trial, the Court had directed, that this cauſe ſhould abide the event of the verdict in another of the cauſes, which was in progreſs for trial.

Clayton Serjt. on this day prayed on behalf of the Plaintiffs, that if any of the witneſſes, many of whom were very aged, ſhould die, or become unable to attend in the mean time, their evidences given upon the former occaſion, might be read at the next trial.

MANSFIELD C. J. You do not want a rule of Court for that purpoſe: what a witneſs, ſince dead, has ſworn upon a trial between the ſame parties, may, without any order of the Court, be given in evidence, either from the Judge's notes, or from notes that have been taken by any other perſon, who will ſwear to their accuracy; or the former evidence may be proved by any perſon who will ſwear from his memory to its having been given.

HEATH J. concurred in refuſing the application.

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VENN *v.* WARNER.

Nov. 24.

If bail by misstake misname in the recognizance the Plaintiff to whom they mean to be bound, the Court will not rectify the recognizance and proceedings in an action thereon after issue joined on *nul tiel record*.

IN the commencement of this action the Plaintiff was called by his true name of *Daniel Nicholas Venn*, but the Defendants, both in giving bail to the sheriff, and in putting in bail above, called the Plaintiff *Christian Nicholas Venn*, which name was found in the bail recognizance; the Plaintiff having sued in that name in an action against the bail, they pleaded *nul tiel record*. The mistake being discovered, *Clayton*, Serjt. had obtained a rule *nisi* for amending the recognizance, and the subsequent proceedings, by substituting the name of *Daniel* for *Christian*.

Lens Serjt. shewed cause, upon an affidavit, which repelled the charge made by the Plaintiff, that the bail had designedly made the misnomer with a view of eluding the responsibility.

Clayton, contrà. If no fraud was practised, the bail intended to be bail in this cause; and then it is only a clerical mistake, which the Court will rectify. There is no dispute about the identity of the parties meant, nor any action pending in the Court at the suit of any person named *Christian Nicholas Venn*, and the mistake, if any, originated with the Defendant, but if it were a trick of the Defendant, then the reason is the stronger that he ought not to be permitted to profit by it.

LAWRENCE J. It amounts to this: the bail say they acknowledge themselves to be indebted to *Christian*, not to *Daniel*; these are therefore not bail in this cause: the Defendants have never recognized in this action.

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The Court diſcharged the rule, and upon the iſſue of *nul tiel record*, gave judgment for the Defendants.

Nov. 24.

HARRIS *v.* PACKWOOD and Another.

If a carrier gives notice that he will not be accountable for goods above the value of 20*l.* unleſs entered and an inſurance paid, over and above the price charged for carriage, according to their value, a perſon who enters ſilk exceeding the value of 20*l*, and does not pay the inſurance, cannot recover any part of the value of the goods, if loſt.

Although the price he agrees to pay for the carriage of the ſilk, is, on account of its ſuperior value, higher than the ordinary price charged for the carriage even of bulky articles.

And although the carrier does not prove that the loſs happened by any of thoſe accidents againſt which the law makes him an inſurer.

The carrier is not bound to prove that he uſed reaſonable care.

Semb. A carrier is entitled to make a higher charge for the ſuperior riſk attending the carriage of valuable goods, but the charge muſt be reaſonable.

THIS was an action brought againſt the Defendants, who were common carriers, to recover the value of forty-ſix pounds of ſilk, delivered to them in *London*, to be carried from thence by their waggon to *Coventry*, and never received there by the conſignees. Upon the trial at Guildhall, at the ſittings after the laſt *Trinity* term, before *Lawrence* J., it was proved that the goods were delivered and booked at the warehouſe in *London*, from whence the waggon ſet out, and that they were ſeen ſafe at *Market-Street*, in the road to *Coventry*, but that they never arrived at *Coventry*. That their value was 126*l.*; that the waggon by which they were carried, formerly was built with bows, and when the bows were cloſed, it was very difficult to take a large parcel out of the loaded waggon, but that for ſome time paſt theſe bows had been taken off and diſcontinued, in order to make it more eaſy to load the waggon, and to enable it to receive a larger load, but that this alteration rendered it an eaſier matter to take out a parcel. The waggon had alſo formerly been guarded, but there had been no guard to attend it for the laſt two years. The waggon uſually arrived at *Towceſter* at two o'clock in the morning, and remained there until twelve at noon, in a yard, under the wall. It was the waggoner's practice on his arrival there, to call up the innkeeper, and to go to bed

5 himſelf.

himself. The Defendant relied upon his having published an advertisement in *November* 1808, which he had sent round to all the silk-traders who then used his waggon, and amongst others, to the Plaintiff, announcing that he would not be accountable for any package whatsoever above the value of 20*l.*, unless entered, and an insurance paid, over and above the price charged for carriage, according to their value, and that no such insurance had been paid in this case; the Plaintiff answered this by proving a former advertisement circulated by the Defendant, containing special terms for the carriage of silk, *viz.* 9*s.* 4*d.* *per cwt.*, while for ordinary bulky articles he charged 6*s.* only, and he contended that the higher price of 9*s.* 4*d.* *per cwt.*, included the premium of insurance. It was admitted, that if the goods had been delivered, the Plaintiff would have paid for them at the rate of 9*s.* 4*d.* *per cwt.* Some other persons paid a halfpenny *per lb.* of silk, besides the price of carriage, for insurance.

Shepherd Serjt. for the Defendant, contended that the claim for insurance meant the same thing, as if the Defendants had said, if goods are of a certain value, we must receive a halfpenny more in every pound of their value for carrying them; and as the Plaintiff had not engaged to pay that, he could not make the Defendant in any wise responsible for the loss.

LAWRENCE J. thought, that as a specific sum was paid for the carriage, and something was to be paid over and above the carriage for insurance, the word insurance must be applied to those risks against which a carrier is bound by law to insure, *quâ* insurer, as fire, robbers, armed force and the like, and that the sum required for insurance must be received as the price of guarding against those accidents; but that without the payment of

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of any ſuch inſurance, he was ſtill bound to guard againſt loſs by expoſure, careleſſneſs, driving into a river, or the like; otherwiſe a carrier might receive the price of carrying the goods, and nevertheleſs be as careleſs as he pleaſed: in this caſe it did not appear that the parcel was not loſt through mere negligence: there was good reaſon why a carrier ſhould be made acquainted with the value of the goods committed to him, that he might take the greater precaution againſt fire, or take greater force to reſiſt felons; but here the Defendant was ſatisfied with the price of the carriage, and undertook to carry for that price, but claimed ſomething further for inſurance: what does that mean? ſurely not for an inſurance againſt his own default of duty! It was incumbent therefore on the Defendant to ſhew that he took reaſonable care of them, not on the Plaintiff to prove a negative, and that the Defendant took no care of them. The jury, under his direction, found a verdict for the Plaintiff, for 126*l.* damages, with liberty reſerved to the Defendants to move for a new trial or nonſuit as they might be adviſed.

Shepherd Serjt. having accordingly in the preſent term obtained a rule *niſi* to enter a nonſuit.

Beſt and *Vaughan* Serjts. on this day ſhewed cauſe; when *Lawrence* J., upon reporting the evidence, ſaid, that at the time of the trial he had not read the caſe of *Nicholſon* v. *Willan*, 5 *Eaſt*, 507. In that caſe there was no diſtinction in the advertiſement between the price of carriage, and the price of inſurance, but the diſtinction was taken in argument, and relied on; the Court, however, held the Defendant not liable. *Beſt* contended that this difference in the two advertiſements materially diſtinguiſhed the preſent caſe from that of *Nicholſon* v. *Willan*; here the contract is, that a certain price ſhall be

paid for carriage, and an insurance over and above that: therefore, inasmuch as the contract is to be taken most strongly against the party who words it, the price of carriage is the compensation for the labour and diligence to be bestowed, and the price of insurance is the price for covering those risks which are purely accidental. [*Lawrence* J. In *Nicholson* v. *Willan* it was very doubtful whether the goods had gone by any carriage.] By the statutes 3 & 4 *W.* & *M. c.* 12., and 21 *G.* 2. *c.* 28., the price of carriage is to be fixed by the magistrates at their quarter-sessions, and the latter statute inflicts a penalty of 5*l.* upon carriers who bring goods to *London*, for taking a higher price than is allowed by the sessions of the county from which they set out; and this statute is not, as it has been supposed, repealed by any subsequent act; but if these statutes be now in force, it is impossible that a carrier can refuse to carry goods for the price which the sessions fix. [*Heath* J. It does not appear that any order of sessions has been made in the present case.] The case of *Oppenheim* v. *Russell*, 3 *Bos.* & *Pull.* 42., contradicts the position, that though a carrier cannot get rid of his whole responsibility, he may vary it in any shape that he pleases. All four of the Judges there held, that a carrier could not create a lien upon the goods delivered to him for his general balance, because he was bound by the law of the country to receive and carry goods for a reasonable reward. [*Lawrence* J. That was a lien as against the owner of the goods to whom they were consigned: the Court did not say that the carrier could not have a general lien against the party sending the goods, if he were also the owner.] But as the law binds the carrier equally to insure, as to carry, if he cannot prescribe the terms on which he will carry, so neither can he prescribe the terms on which he will insure: or, if he may, yet it is not competent to him to require payment for

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an insurance against his own negligence, by which, so far as appeared, this loss was occasioned. Nay more, it was the effect of his own cupidity, for the waggon formerly was advertised as going with a light and a guard, and inasmuch as the Defendant had never publicly countermanded that advertisement, the Plaintiff had a right to suppose that it was still lighted and guarded: he was also bound to have a waggon secure from theft, to which he has rendered it more liable by taking off the bows; yet, without giving any notice of the alteration, he continued to receive the same rate of carriage as he did when the bows were there and the waggon guarded, which is a gross fraud. The non-payment of the price of insurance cannot exonerate the carrier from the duty of ordinary diligence and care; if he wishes to avail himself of his renunciation of the character of insurer, he must shew that the loss happened by an insurable accident, and not by that degree of negligence, against which every man who undertakes to do any thing for hire, is bound to guard. The case of *Tyly* v. *Morrice*, *Carth.* 485., and all the old cases, are cases where a deceit is put upon the carrier as to the value of the goods, and he is relieved against it. *Lane* v. *Cotton*, *Salk.* 18. Lord *Holt* C. J. says "it is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it." This is not only sound law, but excellent sense, as well as great authority. *Lyon* v. *Mells*, 5 *East*, 430. The carrier had given notice "that he would not be liable for *any* damage which should happen to a cargo, unless it were occasioned by the want of ordinary care in the master or crew of the vessel, and in such case, he would pay 10*l. per cent.* upon the loss, provided it did not exceed the value of the vessel and freight: and that persons desirous of having their goods carried free of any risk,

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might have the same so carried by entering into an agreement for the payment of extra freight, proportionable to the accepted responsibility." Yet, where a loss happened by the vessel not being seaworthy, the owner was very properly held liable to the whole extent of the loss, though it was not one of the events in which he consented to be in any case nor to any amount liable. *Ellis* v. *Turner*, 8 *Term Rep.* 532. The Defendant endeavoured to avail himself of a similar notice, but the master of the vessel having carried the goods beyond the place where they were to be delivered, and at which she touched and delivered a part, and the ship being lost on the ulterior voyage, it was held that the owner was liable beyond the 10*l.* *per cent.* for the full amount of the loss. It would be carrying the matter much further than the cases have hitherto gone, to say that because a person does *not* insure, therefore he shall have no remedy for a loss which is not occasioned by insurable perils. The contract in this case is not very explicit, but it is to be expounded with at least as much liberality towards the public as towards the carrier. If then it had been expressly worded that the Defendant would not be liable for any loss incurred by the negligence of himself or his servants, unless an insurance over and above the charge for carriage were paid, would not the Court reject those words, and say that he should not require a premium for insurance against losses which might happen for the want of that care which is paid for in the price of carriage?

Shepherd, contrà. The cases of *Lyon* v. *Mells*, and *Ellis* v. *Turner* are not applicable; the first was decided on the ground of gross negligence in the carrier, who had accepted the goods to carry, not upon the ground that he might not limit his responsibility. In the second case the goods were not lost in the course of the carriage which

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which the Defendant had undertaken, but he had gone beyond the point where they were to be delivered. If the law, that carriers may limit their refponfibility, be wrong, the legiflature alone can alter it; but it probably is the wifeft policy to leave things to find their own level; if the law fixed the fame price for goods of the higheft, as of the leaft value, no one would be a carrier. To fhew that the law had long been fo eftablifhed, he cited *Kenrick* v. *Eggleston*, *Aleyn* 93. *Tiley* v. *Morrice*. *Gibbon* v. *Paynton*, 4 *Burr*. 2298. *Clay* v. *Willan*, 1 *H. Bl.* 298. *Izet* v. *Mountain*, 4 *East* 371. A warehoufe-keeper may be anfwerable for a lofs by fire, if the lofs happens by his efpecial grofs negligence: but in general, a warehoufe-man is not anfwerable for that fpecies of lofs. So, a carrier, like any other perfon, may be liable for grofs negligence, but if he makes an efpecial acceptance of the goods, he is not liable unlefs the Plaintiff fhews that he is guilty of this grofs negligence. It would be impoffible for the Defendant ever to prove the negative, that he was not guilty of grofs negligence. *Rothwell* v. *Davis*, *B. R.* fittings after the laft *Easter* term before *Bayley* J., the carrier gave notice that he would not be anfwerable "unlefs the goods were entered, and properly paid for." Nothing was paid but the booking, and it was held that the Plaintiff could not recover. So, in this cafe, the carrier requires the goods to be "entered according to their value," which is not done; fo that even if all that relates to the infurance be laid out of the queftion, ftill the Plaintiff cannot recover. [*Lawrence* J. No, the words are, "will not be anfwerable unlefs entered," he does not fay "entered according to the value," but that the infurance fhall be according to the value.] *Clay* v. *Willan* is in point, where the words were that he would not be anfwerable for goods above five pounds value, unlefs entered as fuch, and a penny infurance paid for each pound value. If

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the carrier were to ſay he would not be accountable for any of his acts commiſſive or omiſſive, although they amount to groſs negligence, that would be an exception of the very thing, and the Court would not permit ſuch a contract; but that is not this caſe.

MANSFIELD C. J. Theſe caſes, ſo decided, ſeem to have decided the preſent. However we may wiſh the law to be, we cannot make it different than as we find it. In looking into the books, we find the ſpecial acceptance much older than I had ſuppoſed it to be. And it leads to great frauds, for on account of the number of perſons always attending about theſe open waggon yards and offices, every perſon ſtanding around is apprized that this or that parcel contains watches or jewels to the amount of many hundred pounds; this is a great inconvenience, but however inconvenient it is, it ſeems that from the days of *Aleyn* down to this hour, the caſes have again and again decided that the liability of a carrier may be ſo reſtrained; then the queſtion is, whether this loſs is within the contract that has been made, and it ſeems, according to one or two of the caſes, that it is not; for the loſſes have been of a very ſuſpicious nature; in one caſe, the parcel ſeems to have been loſt, before it left the yard; but however, as there was no proof here of expreſs negligence, it ſeems that there muſt be a rule abſolute for a nonſuit. It would, however, be uſeleſs to paſs any ſuch ſtatutes to limit the price of carriage, if a carrier be at liberty to charge what he pleaſes: the price muſt be reaſonable.

HEATH J. was of the ſame opinion. In ſome waggons there are particular ſafe places in the very center, to depoſit jewels and articles of ſuperior value, when they are known to be ſuch.

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LAWRENCE J. I was not aware of the cafes which have been made ufe of, for the word "infurance." It is a very foolifh word, and if the Defendants had faid, we will not in any cafe be liable for the goods, unlefs a certain fum is paid, according to the value, it would have been clear and intelligible; and there is nothing unreafonable in a carrier requiring a greater fum, when he carries goods of greater value, for he is to be paid not only for his labour in carrying, but for the rifk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it underftood that carriers are at liberty by law to charge whatever they pleafe: a carrier is liable by law to carry every thing which is brought to him, for a reafonable fum to be paid for the fame carriage; and not to extort what he will.

CHAMBRE J. I am of the fame opinion. The Defendants fay they will not be infurers, we will not enter into that fituation at all, unlefs we are paid according to the value. Therefore there muft be a nonfuit.

Rule abfolute.

Nov. 26.

MULLER *v.* GERNON.

After a Defendant has undertaken to accept fhort notice of trial, he cannot compel a Plaintiff, refident abroad, to give fecurity for cofts.

FRERE Serjt. had on a former day in this term obtained a rule *nifi*, that the Plaintiff, who was a foreigner, and the captain and owner of a fhip trading from this country to the *Baltic*, and back, fhould give fecurity for the cofts of the action.

Beft Serjt. now fhewed caufe upon two grounds. Firft, on an affidavit that the Plaintiff had frequently traded

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traded hither, and that it was believed he would return, and that according to the case of *Nelson* v. *Ogle*, *Ante*, 2. 253. the Court will not compel a foreign mariner trading to this country, to give security for costs; secondly, that the Plaintiff, having commenced this action for 613*l.* freight due to him, sailed with his vessel in *September* last, after which time, the defendant, on the 13th of *November*, obtained a Judge's order for time to plead, on the usual terms of pleading issuably, and taking short notice of trial: he had since pleaded, and the Plaintiff had now actually given notice of trial, after all which, it was too late to ask for security for costs.

Peckwell, Serjt. (for whom *Frere* had obtained the rule,) endeavoured to support it, on the ground that when the Plaintiff commenced the action, he was in this country, and the Defendant was therefore not then entitled to ask for security for costs, and that as the Plaintiff was owner of a vessel in which he had sailed, there was not the same probability of his return as in the case of foreign mariners serving in the ships of *British* owners, which were domiciled here; and that this motion was made before plea pleaded.

MANSFIELD C.J. In 2 *H. Bl.* 593. *Michel* v. *Pareski*, this Court decided, that after the Defendant had undertaken to accept short notice of trial, they would not compel a foreigner resident abroad to give security for costs. This Defendant has so undertaken, consequently,

The Rule must be discharged (*a*).

(*a*) STEEL *v.* LACY (1).

Marshall Serjt., a few terms since, moved to make a rule absolute to stay proceedings until security should be given for

(1) *Ex relatione Mri. Holmes.*

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costs, the Plaintiff being an *American*, resident in *Philadelphia*.

Shepherd Serjt. shewed for cause, that notice of trial was given for the sittings after *Easter* term.

The Court said the Defendant came too late, and

Discharged the Rule.

Nov. 9.

HILL *v.* PERROTT.

Indebitatus assumpsit lies for goods, which the Defendant had by fraud procured the Plaintiff to sell to an insolvent, and which the Defendant had gotten into his own possession; for he could not set up the sale, because his own fraud had procured it, and the mere possession, unaccounted for, raise an *assumpsit* to pay.

BEST Serjt. moved to set aside the verdict which had been found in this cause for the Plaintiff, at the sittings after the last *Trinity* term before *Mansfield* C. J. in *London*, and to enter a nonsuit. The action was for goods sold: there were special counts upon a contract of the Defendant to pay for goods to be delivered at his request to *Jean Meers Dacosta*; but the evidence being of a contract to pay for goods to be delivered to *Isaac Mendez Dacosta*, those counts failed the Plaintiff. The evidence was, that goods to a considerable amount were looked out to be delivered to *Dacosta*, for which the Defendant undertook to accept a bill at six months to be indorsed by *Dacosta*. The goods were delivered to *Dacosta*, and afterwards were found in the Defendant's possession: the whole was a swindling transaction, in which *Dacosta* was a mere instrument. *Dacosta* was insolvent, and the Defendant having become a guarantee for him, assisted him to buy these goods, which were, the moment after, made over to himself for his own indemnity. The only count that would serve the Plaintiff, was *indebitatus assumpsit* for goods sold, upon which he obtained a verdict.

Best

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Best Serjt. on this day moved to set aside the verdict and enter a nonsuit. Whatever difficulty he might have in defending his client at another bar, there was no contract of sale, he said, between him and the Plaintiff.

The Court held, that the law would imply a contract to pay for the goods, from the circumstance of their having been the Plaintiff's property, and having come to the Defendant's possession, if unaccounted for; and he could not be permitted to account for the possession by setting up the sale to *Dacosta*, which he had himself procured by the most nefarious fraud, because no man must take advantage of his own fraud; therefore *indebitatus assumpsit* lay for the goods, and the verdict could be supported, and they

Refused the Rule.

DOMVILLE, Demandant; KINDERLEY, Tenant; COLLIER, Vouchee.

Nov 22.

If a warrant of attorney for suffering a recovery be acknowledged in a part of the *East Indies*, far distant from the residence of any notary public or *British* magistrate, an affidavit of the acknowledgment, made before a *British* consul or agent there, will suffice.

LENS Serjt. moved that a recovery might pass, although the acknowledgement of the warrant of attorney, which was taken in the *East Indies*, was not taken before a notary public. He moved this upon an affidavit, that the necessary deeds and a writ of *dedimus potestatem*, directed to certain officers in the same regiment in which the vouchee served, were sent out to *Calcutta*, but that at the time of their reaching the vouchee,

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vouchee, he was ftationed at *Lucknow*, in the dominions of the Nabob of *Oude*, where he executed the deeds, and acknowledged the warrant of attorney, and an affidavit of the acknowledgment was made by *Paris Bradfhaw*, Efquire, one of the commiffioners, before *J. Baillie*, Efquire, the *Britifh* conful or agent of the *Eaft India* Company, refident at the Court of *Lucknow*, who was neither a notary public, nor a magiftrate; the affidavit was not fworn before a public notary; and the vouchee ftated, in a letter fent back to *England* with the deeds, that there was no notary public within eight hundred miles of the place. Upon enquiry at the *India Houfe*, the truth of this ftatement was confirmed by the Company's fecretary and chairman.

The Court directed that the recovery fhould pafs, upon firft obtaining an affidavit from the fecretary or chairman of the *Eaft India* Company, that there was neither any magiftrate appointed by the Company, nor public notary refident at *Lucknow*, and provided that it fhould be made to appear that the acknowledgment of the warrant of attorney was taken before two commiffioners, which was not diftinctly ftated upon the prefent affidavit.

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AUBERT *v.* WALSH.

Nov. 26.

Money deposited upon an illegal wager, laid on a future event, may be recovered back again before the period of time has elapsed, on the expiration of which the decision of the wager depends.

THIS was an action for money had and received, brought to recover back the premiums which the Plaintiff had paid to the Defendant upon an instrument or policy, dated the 15th day of *September* 1808, by which, in consideration of forty guineas for 100*l.*, and according to that rate for every greater or less sum received of *B. Aubert*, jun., the Defendant promised to pay the Plaintiff the sum of money which he had thereunto subscribed, without any abatement whatever, in case a cessation of hostilities between *Great Britain* and *France* did not take place, followed up by a peace previous to the re-commencement of hostilities, or preliminaries of peace were not signed, on or before the 1st day of *July* 1810. This was subscribed, one thousand pounds, *B. Walsh*: premium received, 15th *September* 1808. The Defendant accompanied the general issue with a notice of set-off. Upon the trial of this cause at Guildhall, at the sittings after *Easter* term 1810, before *Mansfield* C. J., it appeared that the Defendant had received the premium, and signed the policy, that on the 31st of *October* 1808 a commission of bankruptcy issued against the Defendant, under which he was duly found and declared a bankrupt, that soon afterwards, and before the 1st day of *July* 1810, the several other persons who had paid premiums upon similar policies, claimed to prove before the commissioners, the amount of the premiums paid, as a debt due from the bankrupt's estate; but that the commissioners refused to permit the proofs. Upon which the Plaintiff thought it useless to prefer his claim, and no direct demand was made for the re-payment of the premiums before this action, the declaration, in which was en-

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titled of *Easter* term 1810. The Defendant contended that the Plaintiff could not succeed, because if the wager were illegal, the parties were in *pari delicto*, and the law would not interfere to help either. For the Plaintiff it was answered, that it was competent for him at any time before the event was decided on which the wager was to depend, to abandon the contract, as had here been done, and in that case, to recover back the premium paid: *Mansfield* C. J. reserved the point, subject to which the jury found a verdict for the Plaintiff.

Best Serjt., in this term, had obtained a rule *nisi* for setting aside the verdict, and entering a nonsuit.

Shepherd and *Marshall* Serjts. on a subsequent day shewed cause. Although this contract is not drawn up in the regular form of a policy, it is a contract of wager on a subject on which it was not legal to lay a wager, being prohibited by the statute 14 *Geo.* 3. *c.* 48. *s.* 1. in which the words, "or any other event whatsoever," go far beyond mere life policies, as was held in the case of *Roebuck* v. *Hamerton*, *Cowp.* 737. upon a wager on the sex of the *Chevalier D'Eon.* And the sum paid having been demanded back before the time had elapsed which was to determine the policy, the Plaintiff may recover it. All the cases decide that it may be recovered before the risk has been run, and some even go so far as to say that it may be recovered after the event has been decided; though the greater number hold, that after the risk has been run, the premium cannot be recovered back. Such are *Lowry* v. *Bourdieu*, 2 *Doug.* 470., where *Buller* J. says, "there is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other

party

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party to his original situation." *Willes* J. there thought the Plaintiff entitled to recover back the premium, although the event had happened. [*Mansfield* C. J. No loss had happened in that case.] The party had waited to see whether a loss would happen or not, before he rescinded the contract, which was the reason of the judgment. *Andree* v. *Fletcher*, 2 *T. R.* 161. 3 *T. R.* 266. It was held that the premium paid for a re-assurance could not, after the capture had happened, be recovered back. *Vandyck* v. *Hewit*, 1 *East.* 96. The premium paid upon a policy designed to cover a trading with an enemy's country, cannot be recovered back. *Howsen* v. *Hancock*, 8 *Term Rep.* 575. Where money, deposited with a stakeholder upon an illegal bet, had been paid over by the stakeholder to the winner with the consent of the loser, and the loser brought an action to recover it back, the Court held that *potior est conditio possidentis.* But in the case of *Cotton* v. *Thurland*, 5 *T. R.* 405., it was held, that although the risk was determined, yet money deposited on a bet, and still remaining in the hands of the stakeholder, might be recovered back from him by the loser. *Lacaussade* v. *White*, 7 *T. R.* 535. The Defendant received 100*l.* to pay 300*l.* if articles of peace were not settled between *England* and *France* before the 11th of *September* 1797. The Plaintiff after that day sued on this agreement for the 300*l.*, which it was held he could not recover, because the wager was illegal; but it was held that he might recover back his premium, the Court saying, that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration, it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract. [*Chambre* J. That doctrine has been several times adopted in favor of oppressed persons, but that is the distinction.] *Tappenden* v. *Randall*, 2 *Bos.* & *Pull.*

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467. A bankrupt had paid two hundred guineas to the Defendant to receive an hundred annually until the amount of the hop duties should reach 100,000*l.*, and it was held that his assignees might recover back the premium paid, although the wager was illegal; and *Heath* J. there adopted as found the distinction taken by *Buller* J. between contracts executory and executed, if taken with those modifications which he necessarily would have applied to it. Where nothing occurred of a nature too grossly immoral for the Court to enter into any discussion of it, he thought there ought to be a *locus pænitentiæ*; and that a party should not be compelled against his will to adhere to the contract. In the present case it is unnecessary to consider how the rights of the parties would have stood if the 1st of *July* had arrived before the Plaintiff had rescinded the contract, nor whether in that event the doctrine of *Lacaussade* v. *White*, or that of *Lowry* v. *Bourdieu* should have prevailed: suffice it to say, that the result of all the decisions is, that where a party has paid money upon a wager or policy that cannot be sustained by law, there he may rescind that contract before the event has happened on which the decision of the wager depends, and no case contradicts this position. There is no *par delictum* in this case, for there is no moral turpitude in the contract, a distinction that has been often established.

Lens and *Best* Serjts. *contrà*. In *Lowry* v. *Bourdieu* only *Buller* J., of all the Court, takes the distinction between contracts executory and executed, and he does not mainly rely on it, but only adds it to his other reasons. The distinction however is fallacious as applied in the present case, for if a contract be illegal, it is void; it is then no contract; it cannot be said to be either executed or executory. The distinction is solid as applied to legal contracts, but here it makes no difference in sub-

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ſtance, or in law at what time the Plaintiff brings his action: it is not in his option to keep alive or to reſcind a contract, where the law declares that no contract ſubſiſts. [*Mansfield* C. J. In *Tappenden* v. *Randall*, the Court conſidered the diſtinction between contracts executed and executory as eſtabliſhed; the Judges all make that diſtinction; it is not called in aid, it is the ground of their judgment; although Lord *Alvanley* C. J. diſtinguiſhed alſo between contracts immoral and merely illegal.] That laſt diſtinction may alſo well be queſtioned as applicable to that caſe; for no contract is innocent, which is productive of inconvenience to the ſtate: but the ground of that caſe was, that up to the time of bringing the action, no diſcloſure had been made of the amount of the hop duties, and that the diſcloſure only was inconvenient and therefore illegal; but in the caſe of *Forſter* v. *Thackery*, *B. R. Trin.* 21 *G.* 3., afterwards in the Exchequer, 1 *T. R.* 57. *n.* (the firſt caſe that was determined on wagers on the continuance of peace or war,) the Court determined, that from the nature of the ſubject the thing was illegal. [*Heath* J. It certainly was an ingredient in that judgment, that ſuch contracts influence men's minds in a manner that may be prejudicial to the intereſts of the country, and therefore are void at common law.] The Plaintiff may elect, indeed, whether he will await the event, to ſee if the other party will voluntarily pay him, but that is not a legal conſideration. The Plaintiff's only motive for repentance in this caſe, was not the illegality of the contract, but the bankruptcy of the paymaſter, whoſe aſſignees could not employ his effects in paying illegal wagers. The parties meant to contract on honour; the Plaintiff therefore ſtill has all the ſecurity he ever contemplated, the honour of the bankrupt, and to that he muſt ſtill look for the completion of his contract. If he has judged unwiſely, he muſt abide by his choice. The

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action of *Lacauſſade* v. *White* was brought, not to reſcind, but to enforce the wager; and it ſeems to have been Lord *Kenyon*'s own ſuggeſtion that the Plaintiff ſhould recover back the hundred pounds premium as money had and received. That caſe certainly has not been acted on ſince; and in *Vandyck* v. *Hewit*, *Le Blanc* J. juſtly obſerves that the ground of that determination had been ſince very much canvaſſed in the caſe of *Howſon* v. *Hancock*. The law muſt be a rule to every man; and though it has been held for the protection of the weak, that even where there is *par delictum*, the beſt policy is not to allow the ſtrong to retain the money they have gotten, yet here the parties meet on equal terms, and meant to proceed without any reference to the law at all. What neceſſity is there that the law ſhould raiſe an *aſſumpſit* to pay back to you the money which you voluntarily and with your eyes open have parted with? The circumſtance of money having been paid over to a winner, or ſtill remaining in the hands of a ſtakeholder, makes no difference: for if the party is to be ſo far aided that he is to be put into the ſame condition as if he had not paid the money, it is upon the ground that the money has paſſed out of the Plaintiff's pocket into the hands of one who has no legal right or conſcientious demand to hold it. But the objection is, that where a tranſaction is illegal, as this is, no party to it can come into a court of law and claim a benefit; now to receive back the money is a benefit. It is a proper puniſhment on the Plaintiff if he has fooliſhly and improperly parted with his money, that he cannot again recover it.

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the opinion of the Court. This is an action on a wager brought to recover back the premiums paid, and it is reſiſted on the ground

ground that it is an illegal wager, and that before the period at which the wager was to be determined, the Plaintiff claimed the money which he had advanced to be repaid. There have been many cafes cited, to prove that in the cafe of payment of money on illegal tranfactions, *potior eft conditio poffidentis*; but the diftinction is taken here, that the demand of the money back, before the day, was a refcinding of the illegal contract. There is, however, fome doubt on the foundnefs of that diftinction, unlefs accompanied with fome qualification, for it does not clearly appear what is the period before which the contract may be refcinded, becaufe a man may wait till the event of the wager can be very clearly known and forefeen, and may he then refcind the contract, and fave his money? However in *Lowry* v. *Bourdieu*, *Buller* J. took the diftinction between a cafe where the event had happened, and where a man had taken his chance of winning, and the cafe where he had not; and that diftinction was exprefsly adopted by the Judges of this Court in *Randall* v. *Tappenden*, which was moft clearly decided on that ground; and fubject to the obfervation above made, I think there is good fenfe in that diftinction; and why fhould not a man fay, you and I have agreed fo and fo, but the agreement is good for nothing; I cannot bind you, and you cannot bind me, and therefore I defire, before the event happens, that you will pay me back my money: this is, in fact, a relieving againft the effects which an illegal contract, perfevered in, would produce. We therefore are of opinion that this diftinction muft be fupported. But there is a very ftrange cafe in Mr. *Loft's* Reports, *Walker* v. *Chapman* v. *Walter*; Lord *Mansfield* however there feems to have adopted the fame doctrine; and it appears by his expreffions as if the perfon came into court, not to have the money back again after the event decided, but to refcind the illegal contract. I muft take notice of one

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case, a very ſtrong one, reported in 7 *T. R.*, *Lacauſſade* v. *White*, where the Court ſaid, it was more conſonant to policy, that money paid on an illegal contract might be recovered back, than that it ſhould be retained. That was a ſtrong caſe certainly in favour of the preſent Defendant; but this doctrine is directly contrary to what Lord *Kenyon* C. J. ſaid afterwards in *Howſon* v. *Hancock*, where he ſeems to have entirely forgotten *Lacauſſade* v. *White*. Lord *Kenyon* there ſays, "there is no caſe to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." Now this is directly contrary to *Lacauſſade* v. *White*; and he afterwards ſays, that *Howſon* v. *Hancock* is very different from that caſe, which he ſays "was the caſe of a ſtake recovered from a ſtakeholder, before it had been paid over." But here he certainly miſtook *Lacauſſade* v. *White* entirely, for there is no ſtakeholder in the caſe, nor any thing like it: and in 1 *Eaſt*, 96., *Vandyck* v. *Hewit*, it was ſaid by Lord *Kenyon*, that the rule had been ſettled in all times, that where both parties were in *pari delicto*, *potior eſt conditio poſſidentis*. I mention theſe caſes to ſhew that the authority of *Lacauſſade* v. *White* is very much ſhaken, and cannot be relied on, and that we do not decide on the authority of that caſe. But here the Plaintiff, before the time of deciding the event, reſcinds the contract, as he is at liberty to do.

Rule diſcharged.

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Nov. 26.

THIS was an action upon a policy of insurance, dated in *June* 1808, upon a voyage at and from *London* to *Riga*, during her stay there, and from thence to the port or ports of discharge in *Scotland*, upon the ship *Pennsylvania*, Captain *George Thomas*. This cause was first tried at *Guildhall*, before *Mansfield* C. J. at the sittings after *Hilary* term 1810, when the Plaintiff gave evidence of an adjustment, which being a surprize on the Defendants, they were but imperfectly prepared to resist; and although they gave such evidence as they could, the case was not fully before the jury, and a verdict passed for the Plaintiff, subject to a point reserved, whether the adjustment were conclusive against the Defendant.

A neutral vessel is not seaworthy unless she is provided with documents to prove her neutrality.

Although the production of those documents would, if she had been captured by one particular belligerent, have rendered her liable to condemnation under an ordinance of that power.

If a neutral vessel be insured on a voyage on which it is notoriously necessary to carry simulated papers, in order to elude one of the belligerents, whether permission to carry them must be expressed in the policy? *quære*.

An *American*, bound from *London* to *Riga*, was taken by the *Danes*, and condemned for circumstantial reasons, and, amongst others, the want of a sea-passport and muster-rolls, she was provided with false clearances from *Bergen*, but they were not produced. Her sea-passport would have proved she had come from *London*, which, under the *Berlin* decree, would be a ground of condemnation by the *French*. Held that although it would subject her to this risk, she ought not to be without those documents which would prove her neutrality with respect to other belligerents.

Marshall Serjt. in *Easter* term 1810, obtained a rule *nisi* for a new trial upon two grounds; 1st, that the adjustment was a surprize on the Defendant; 2dly, that the effect of it was repelled by evidence on the part of the Defendant, shewing, by a *Danish* sentence of condemnation, that the ship, which had been represented to the underwriters to be *American*, was not furnished with all those documents which either by the law of nations or by treaty, she ought to possess. The nature of an adjustment, he argued, was well stated by Lord *Ellenborough* C. J. in the cases of *Herbert* v. *Champion*, 1 *Campb. N. P. Cas.* 137., and *Shepherd* v. *Chewter*, *ibid.* 174., who

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who fays, it is a promife to pay, which is not binding, unlefs founded on the confideration of previous liability.

MANSFIELD C. J. It is clear to me that there was a furprize. If the Plaintiff means to rely upon an adjuftment, he ought to give notice to the other party of his intention. As to the other point, it feems to be clear that an adjuftment is not binding if it in any degree proceeds on miftake.

LAWRENCE J. It is always competent to the Defendant to fhew that the adjuftment ought not to bind him, although it is *primâ facie* evidence of a cafe. There muft be a new trial.

Shepherd and *Beft* Serjts. fhewed caufe againft the rule.

Upon the fecond trial, at the fittings after *Trinity* term 1810, at *Guildhall*, before *Mansfield* C. J., it appeared that the veffel infured had come from *New York* to *London* with a cargo of pitch, tar, and other naval ftores; from hence fhe was chartered from *London* to *Riga*, and back, and failed on the voyage under a *Britifh* licence; while fhe was lying about two miles from the caftle of *Elfineur*, fhe was boarded by a privateer, which carried her into a *Danifh* port; fhe was libelled in the Prize Court of *Zealand* as prize, and condemned; the fentence of the Court was as follows: " In this prefent cafe againft *George Thomas*, who, together with the fhip *Pennfylvania*, whereof he was mafter, has been brought to this place on his voyage from *London*, it has been afcertained, that the fhip *Pennfylvania* is not provided with any fea-paffport, whereof Captain *Thomas* has alleged as the reafon, that the paffport granted him from his home

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ſtation at *New York*, was ſtyled for a fixed voyage from *New York* to *Madeira*; in conſequence whereof the *North American* conſul at *London* had kept this paſſport, ſignifying, according to the nature of the paſſport, it was indifferent whether he had it or not: beſides, he has exhibited in the court a certificate from the *North American* conſul at *London*, purporting that, amongſt ſeveral papers, he has depoſited his ſea-paſſport with the ſaid conſul. Now, as the reaſon alleged of the want of a paſſport is inſignificant, becauſe Captain *Thomas* ought not to have undertaken other or more voyages than ſuch whereto he was authorized by his government, this want is alſo, (agreeably to the regulation for privateers, and the lawful adjudication of prizes of the 14th *Sept.* 1807, -8, -9, *letter c.*,) a reaſon of condemnation, and the Court has no convenient reaſon at all to deviate from this ſeverity reſpecting the circumſtances of the caſe *in concreto*, being all againſt the captain. Thus, four men of his crew have unanimouſly declared, that two days previous to the ſeizure, in order to perſuade them at *Elſineur* to aſſert that they came from *Bergen*, he had replied to their objections in this behalf, that he was provided with clearings from *Bergen*, and that he had a journal, conceived in ſuch a manner as to make it appear that he came from *Bergen*: the remaining people of his crew, not confeſſing to have heard any ſuch thing, had nevertheleſs not found it ſeaſonable to deny, that at the time mentioned by the ſaid four witneſſes, he hath had ſeveral of the people collected (*a*) in their proof; and the captain, who denies to be or to have been provided with clearings from *Bergen*, &c. has, notwithſtanding, confeſſed that he hath ordered the people to ſay that the ſhip came from *Bergen*. Likewiſe, it is aſcertained, that when the captors came on board, he told them that he

(*a*) *Semb.* Some error of the tranſlator.

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came from *Bergen*, and that he did not change this declaration previous to his appearing in the court. A witness, yet of no unquestionable credibility, has constantly persevered in saying, that after the seizure, papers had been burnt on board; besides, considerable wants exist amongst Captain *Thomas*'s papers; as, for instance, that his journal does not at all proceed from the time when he left ultimately his pretended home, but begins at a voyage from *Guadaloupe*; though he relates, that previous to that time he had sailed from *New York* to *Madeira*, and from thence to *Guadaloupe*, he is not provided with any muster-roll; and the agreement in writing for the wages, made between the master and the crew at *London*, is not attested by the *North American* consul of the said place, whereby it might appear that at least it was with this officer's knowledge that he undertook this voyage; further there has been found amongst his papers, a letter, having all the characters of being fictitious, and fabricated for the purpose of making it probable that it is for account of the ship's pretended owner he is to sail for *Riga*, in order there to purchase a return cargo. We are of the opinion that the aforementioned partly decisive and partly suspicious *data*, are sufficient for to decide the fate of the ship *Pennsylvania*, and that it is needless to enumerate the several other suspicious circumstances which aggravate the same." Wherefore the sentence proceeded to condemn the vessel as prize. From this sentence the Captain appealed to the High Court of Admiralty at *Copenhagen*, which confirmed the decree in the following terms: "It is *in confesso* that the ship, pretended to be *North American* property, hath no sea-passport, in which respect Captain *Thomas* hath asserted that his passport was styled for a voyage from *New York* to *Madeira*; and that the *American* consul at *London* had retained the same, it being of no avail, as to the nature of the passport, whether the

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Defendant had it or not: hence it follows, that even if Captain *Thomas* has been in poffeffion of fuch a paffport, he hath at leaft undertaken other voyages than thofe whereto he was authorized by his government, on which the paffport fo delivered could not protect him: this circumftance muft, *in cafu*, be fo much the more binding againft him, as the other circumftances of the caufe are likewife againft him. Out of his fhip's crew, four men have witneffed that Captain *Thomas* had ordered them to fay, that the fhip came from *Bergen*: befides, he declared himfelf that he had papers along with him, purporting that he was cleared out from the faid place. This circumftance is corroborated thereby, that Captain *Thomas* has confeffed to have ordered them to fay that he came from *Bergen*, which alfo he declared to the captors at their arrival at the fhip, though he came from *England*: to this muft be added, that the fhip's journal or log-book is not commenced at her departure from *North America*, and that fhe has not been provided with any mufter-roll, delivered or attefted by an *American* officer, on account whereof and of the regulation for prizes, S. Q. A., the fentence of the Prize Court, as to the fhip's condemnation, ought to be confirmed." The evidence of *Thomas* the mafter, who was gone out of this country, was read from the Judge's notes of what he had fworn on the former trial. He depofed that the fhip was an *American*, that he had all regular documents on board, but that he believed they were all left in *Denmark*. That he had a fea-paffport and a *Britifh* licence, but that he produced neither to the Court at *Elfineur*: he did not produce the paffport, becaufe it would have fhewn that he came from *New York* to *England* with naval ftores. It was not ufual for veffels to take a paffport to go up the *Baltic*: he had told the mafters of the privateers that he came from *Bergen*, but he did not produce clearances from *Bergen*: he had

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fuch on board. He had kept the charter-party and the fea-paffport. The *American* conful, being examined, fwore, that when the fhip failed from *England* he muft have been fatisfied the due papers were in his office. The firft underwriter on the policy fwore, that he did not know whether, at the time of the fhip's failing in *June* 1808 for *Riga*, it was neceffary for a fhip to have fimulated papers, but that at prefent it was quite neceffary: feveral brokers and other witneffes proved, that fince the *Berlin* decree, the date of which was *November* 21, 1806, a fhip could not fafely proceed to the *Baltic* without fimulated papers: that no policy would now be underwritten without liberty to carry fimulated papers; that fome underwriters had refufed to fubfcribe policies, becaufe the fimulated papers were not well arranged; that no fhip could fail to *Ruffia* without fimulated papers, but that fome policies on that voyage did, and others did not contain an expreffion of the liberty to ufe them. The Defendant, as before, contended upon this evidence, that the fhip was not properly documented as an *American*, and was therefore not feaworthy. Another ground of defence which he took, was, that fhe had carried fimulated papers without permiffion. *Mansfield* C. J. put a queftion to the jury, whether a fhip could now fail to the *Baltic* without fimulated papers, and they gave it as their opinion that, fince the *Berlin* decree, fhe could not. The jury again found a verdict for the Plaintiff.

Marfhall in this term again moved to fet afide the verdict and enter a nonfuit, upon both the abovementioned grounds of defence.

Shepherd and *Beft* Serjts. fhewed caufe. Every perfon who underwrites is bound to know the ufage and courfe of the trade, and the mode of carrying it on, and if he

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insures the voyage, every thing which is necessary to the performance of the voyage is lawful under that insurance, without the permission being expressed. Thus, in the case of *Matthie* v. *Potts*, 1 *Park. 6 ed.* 29., the policy was on an adventure, contraband by the revenue laws of *Spain*, at and from *Nassau* to *Campeachy*, and at and from *Campeachy* to *Nassau*, and the risk to endure upon the goods until the same should be discharged and safely landed: the ship, being arrived in the bay of *Campeachy*, made signals for barks or launches from the shore, which came off, and the goods were put on board them, but before they were landed, they were taken by *guarda costas*; and it was contended that, as the policy did not expressly include the risk in craft and lighters, these goods were not within it; Lord *Alvanley* left it to the jury whether it were not notorious to the underwriters that this was the ordinary mode of conducting that trade; for that if it were, they must be understood to assent to it, and the jury found it was; and upon a rule *nisi* for a new trial, the verdict, which had passed for the Plaintiff, was sustained upon this point, although it was lost upon the ground of a variance, because the loss was averred to be by hostile capture, whereas it was occasioned by a revenue cutter. [*Lawrence* J. That policy was, until the goods were discharged and safely landed.] The duty of the master was discharged as soon as the goods were over the ship's side. [*Mansfield* C. J. In the case of *Sparrow* v. *Carruthers*, 2 *Stra.* 1236., it was held, that when the goods were delivered out of the ship on board the owner's own lighters, the risk ceased.] So here, as in *Matthie* v. *Potts*, they are to be considered as being virtually on board the ship, so long as they are in the course of being dealt with in the pursuance and performance of the voyage. It is necessary to the performance of this voyage, that the vessel should have simulated papers: for if, being detained by

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a belligerent, the maſter produces ſimulated papers, he eſcapes; if he has them not, he is condemned. The acts of the uſurper of *France* have made ſo complete a change in the circumſtances of maritime commerce throughout *Europe*, that the mode of carrying on trade is entirely altered: that which was formerly the general rule is now become the exception, and that which was the exception is become the general rule; it is neceſſary to expreſs the exception in a contract, it is not neceſſary to expreſs the general rule. It was therefore unneceſſary to expreſs in the policy the permiſſion to carry ſimulated papers, or to ſuppreſs the genuine papers. It is clear law that the aſſured need not diſcloſe that to the underwriter, which is notoriouſly known to all men. It is notorious that a ſhip cannot go this voyage without ſimulated papers; it was in proof that underwriters would not inſure without them. The Defendants knew the voyage they were inſuring; they knew that without theſe papers the veſſel muſt have been condemned. They knew the veſſel was an *American*, and that ſhe had been at *London*, which alone would, under the *Berlin* decree, be a ground of condemnation. It is immaterial, therefore, whether they were informed that ſhe came hither with a cargo of ſtores contraband of war. This Court decided in the caſe of *Toulmin* v. *Anderſon*, *ante*, i. 227., that a maſter may take any thing on board which does not neceſſarily increaſe the riſk, unleſs it be proved that the taking it on board does actually increaſe the riſk. The taking theſe papers on board, (to ſail without which would be abſolute deſtruction,) certainly does not of neceſſity increaſe the riſk, nor have the jury found that it did. Law is a relation to things, and as times and circumſtances alter, the law muſt alter accordingly. Sir *W. Scott* has declared that, under the preſent circumſtances of *Europe*, if trade with the continent is to be carried on at all, it muſt be carried

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on by the aid of ſimulated papers. If a licence to carry them be not implied, the ſubſcribing a policy is equivalent to an abſolute contract to pay the aſſured the value of his goods upon their arrival in *France*, whither they will aſſuredly arrive, without the aid of theſe papers. If he be not at liberty to carry them, it would amount to the ſame thing as if the veſſel were warranted free from capture by an enemy. Not only therefore is this licence implied, but it becomes an imperious duty on the aſſured to provide ſuch papers: without them the ſhip is not ſeaworthy, and the aſſured would be guilty of a fraud if he were to omit them.

Secondly, as to the abſence of genuine documents. If the veſſel be at liberty to carry ſimulated papers, it neceſſarily follows that the maſter is at liberty to ſecrete all ſuch genuine documents, as being contradictory to the ſimulated papers, would, if produced, evince the deception, and render his condemnation certain. It would alſo have appeared by the real papers, that this neutral veſſel had been to *London* with a cargo of naval ſtores, contraband of war, which would have enſured her condemnation. Beſides, it does not appear clearly by the ſentence, that the Court relied on the abſence of the genuine papers. The ſentence ſpeaks of "partly deciſive and partly ſuſpicious *data*," without diſtinguiſhing the one from the other. [*Mansfield* C. J. The Court clearly ſay, they rely on the want of a ſea-paſſport, and the Defendants' own evidence ſhews that they had not that.] No caſe has yet decided that ſuch a ſentence as this, not adjudicating the ground of condemnation, precludes evidence of what papers the veſſel had, and what ſhe had not; and by the evidence of the maſter it appears, that ſhe had all neceſſary papers; but where occaſion required it, he was at liberty to ſuppreſs them, becauſe they would have ſubjected the ſhip to certain condemnation under the *Berlin* decree, and it does not

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lie in the mouth of the underwriters to demand, that the captain ſhall have papers which would bring certain ruin on him and on themſelves. *Ceſſante ratione, ceſſat lex.* It was formerly neceſſary that an *American* or other neutral ſhip ſhould be documented as ſuch. Why? For her protection, and in order to exempt her from the perils of war; becauſe without ſuch documents ſhe could not enjoy the benefits of her neutrality when captured by a belligerent. Formerly an *American* or other neutral ſhip, duly documented, could freely paſs the ſeas; but now, ſince the *Berlin* decree, ſhe would be completely deſtroyed by thoſe documents which prove her neutrality: they would enſure certain confiſcation. The law is not ſo abſurd as to pronounce always the ſame judgment upon the ſame facts, when the reaſons that make the judgment applicable to the facts ceaſe: it makes no difference that this was a capture, not by the *French*, but by the *Danes*, for it is notorious that ſince the *Berlin* decree, all the continent of *Europe* is regulated by the ſame practice, whether legal or illegal. It was moreover both lawful and incumbent on the maſter to take meaſures for his protection againſt *French* capture, the riſk moſt to be dreaded of all which were covered by this inſurance, although in the event it happened that the loſs was occaſioned by a *Daniſh* force.

Marſhall and *Vaughan* Serjts. *contrà.* There are three grounds of defence in this caſe. Firſt, that the ſhip had not ſufficient documents on board. Secondly, that the *Daniſh* ſentence of condemnation is concluſive evidence that ſhe is not, for the purpoſes of this policy, neutral, but enemy's property; and thirdly, that ſhe had on board ſimulated papers, without any licence either expreſſed or implied. 1. Every ſhip poſſeſſes ſome national character, and it is neceſſary for her to comply with thoſe regula-

tions which are laid down in order to diftinguifh her country; and for want of fuch compliance fhe is liable to be detained or confifcated. *Rich* v. *Parker*, 7 *T. R.* 705. *Barzillai* v. *Lewis*, 2 *Park*, (6 *ed.*) 469. And the fentence of condemnation is decifive evidence againft her neutrality. *Saloucci* v. *Woodmafs*, 2 *Park*, 471. *Bolton* v. *Gladftone*, 5 *Eaft*, 155. and *ante*, 2. 85. The fabricated papers found on board, the falfe journal from *Guadaloupe*, the fictitious account of her voyage from *Bergen*, all of which are mentioned in the fentence, decifively difproved her neutral character. It never was before fuggefted that fimulated papers might be carried without a licence. By the marine law of *Europe*, the circumftance of having fictitious papers on board is a lawful ground, at leaft of detention, if not of confifcation. Cafe of the *Welvaart*, 1 *Robinfon.* 122. Cafe of the *Joanna Tholen*, 6 *Rob.* 72. *Mars*, 6 *Rob.* 79. Another ground, on which the Defendant might fafely rely in this cafe, is the fpoliation of papers, which has always been held a ground of detention. *Rifing Sun*, 2 *Rob.* 109., where Sir *W. Scott* lays it down as a general rule, that as far as freight is concerned, the owners were legally bound by the mifconduct of the mafter, by the fpoliation of papers. It is not within the province of the jury to find that fimulated papers are indifpenfable to this voyage: at leaft their verdict cannot alter the marine law of *Europe*. If they are indifpenfable, yet they ought not to be taken on board, in contravention of that law, without permiffion. The affured were guilty of a culpable concealment in not difclofing to the underwriters that it would appear upon examination of the fhip's paffport that fhe had come to *England* with naval ftores, if that were really a ground of condemnation; but in truth there was no reafon why the mafter fhould not produce thefe papers; the carrying goods contraband of war, is, by the law of nations, only a ground of condemnation, if

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the veſſel be taken, while they are on board. [*Lawrence* J. cc. But does not the *Berlin* decree confiſcate all ſhips whatever coming from *London?*] Yes, but it is not in evidence that that law, made by the uſurper of *France*, has ever been adopted by any other nation; and what is the received law of a foreign nation is a fact to be proved by evidence. The *Berlin* decree does not make the law of nations: it never was obligatory on, or adopted by, the *Danes*, *Swedes*, or *Ruſſians;* nor was it the ground of this ſentence of condemnation, which is very full and elaborate, and proceeds to condemn the veſſel on principles of general marine law only; the proof is, that although it four ſeveral times mentions her coming from *London*, which under the *Berlin* decree would alone be fatal, it contains not a hint that ſhe was liable to condemnation upon that account. [*Heath* J. acc.] It was clear that the maſter did not believe the *Berlin* decree to be received in *Denmark*, by his confeſſion of coming from *London*. [*Lawrence* J. It is not your point to diſprove that theſe nations have adopted the *Berlin* decree, but that which you have to combat is the argument that the veſſel being liable to capture and condemnation by the *French*, under the *Berlin* decree, it was neceſſary for her to be ſo documented as to avoid that danger.] If indeed the danger of *French* capture were the principal riſk in this voyage, there might be more colour for the argument; but looking at the contract between the parties, the nature of the voyage, and the circumſtances of the caſe, it is evident that *Daniſh* capture in the *Baltic* was the peril principally to be apprehended; and who can ſay that if this veſſel had been fairly documented as a neutral, ſhe would have been condemned in this caſe. Neither the practice of any man, or of any deſcription of men, nor any change of circumſtances, can alter the general law. [*Mansfield* C. J. In the caſe of *Davies* v. *Powell*, *Willes* 46., which was treſpaſs for diſtreining deer,

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deer, Lord C. J. *Willes* fays, "The argument *ab inusitato*, though generally a very good one, does not hold in the prefent cafe. When the nature of things changes, the rules of law muft change too. When it was holden that deer were not diftreinable, it was, becaufe they were kept principally for pleafure, and not for profit, and were not fold and turned into money, as they are now. But now they are become as much a fort of hufbandry, as horfes, cows, fheep, or any other cattle. Whenever they are fo, and it is univerfally known, it would be ridiculous to fay, that when they are kept merely for profit, they are not diftreinable as other cattle, though it has been holden that they were not fo, when they were kept only for pleafure."] There is no power in this country which can alter the marine law, except that the legiflature may do it fo far as regards our own practice. A foreign ordinance does not conftitute a part of the law of nations. *Mayne* v. *Walter*, 2 *Park*, (6 *ed.*) 474. A *French* ordinance prohibited *Dutch* fhips from carrying a fupercargo belonging to any nation at enmity with *France*, and the veffel was condemned becaufe fhe had on board an *Englifh* fupercargo. Our courts at once fhrunk from the idea of recognizing this ordinance as part of the law of nations, and faid it was an arbitrary and oppreffive regulation. *Pollard* v. *Bell*, 8 *Term Rep*. 434. confirmed the fame doctrine.

Cur. adv. vult

MANSFIELD C. J. on this day delivered the opinion of the Court. The queftion is, whether the Plaintiff is entitled to recover, or not; if not, a nonfuit is to be entered. This is an infurance on a voyage to *Riga*; in the policy there is no provifion permitting the infured to ufe fimulated papers, on which there has been a great deal of argument, but which, in the judgment I am going to give, one may almoft leave out of the cafe; and on the evidence,

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evidence, I think it was quite improper for me to aſk the jury what I did, reſpecting the neceſſity of ſimulated papers. At the ſame time, I give no opinion on what might be the caſe, if the ſame point was to ariſe on proper evidence; but there muſt be pretty ſtrong evidence of the neceſſity of ſimulated papers, to induce the Court to give ſanction to them. But the queſtion I aſked was alſo improper, becauſe it was, as to what is now neceſſary; the jury took it for granted that the *Berlin* decree was adopted in *Denmark*, but on looking at the ſentence, it is perfectly clear that the Court in *Denmark* did not proceed on the *Berlin* decree, otherwiſe it would have inſtantly pronounced a ſentence of condemnation on the firſt line of it; namely, that the ſhip came from *London*; that alone would have been ſufficient. It is ſtated on the face of the ſentence, that the want of the ſea-paſſport was a ground of condemnation, and that the Court had no convenient, (meaning no ſufficient) reaſon, to depart from this ſeverity, the circumſtances *in concreto* being all againſt the captain. For the reaſon I have mentioned, it is manifeſt that the *Berlin* decree could not ſubſiſt in *Denmark*, and that being ſo, the ſhip is in the common ſtate of an *American* ſhip, which therefore ought to be documented as a neutral ſhip: it is quite ridiculous to talk of this ſhip being an *American*, if ſhe is not to be documented as an *American* ſhip. We are of opinion therefore that the Rule muſt be abſolute for a

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A ſhip is ſeaworthy, if ſhe is ſufficiently furniſhed for the ſervice in which ſhe is for the preſent time engaged.

Therefore, a ſhip much out of repair is ſeaworthy in harbour, and is protected under the word "at."

And as a full complement of men is not neceſſary in harbour, ſhe does not ceaſe to be ſeaworthy for want of a crew till ſhe ſails on the voyage without a crew.

If a ſhip, ſeaworthy to lie in port, ſails without being rendered ſeaworthy for the voyage, upon a policy "at and from," there can be no return of premium.

THIS was an action upon a policy of inſurance, at and from *Surinam* to *London*. Upon the trial of the cauſe at *Guildhall*, at the ſittings after *Trinity* term 1810, before *Mansfield* C. J., it appeared, that the veſſel arrived at *Surinam*, and lay there a conſiderable time before ſhe ſailed, during which ſhe took in a cargo of goods, of the value of 6000*l.* She ſailed on the homeward voyage on the 1ſt of *Auguſt* 1808, but before ſhe got down to *Braam*'s point, at the mouth of the *Surinam* river, ſhe grounded and was loſt. The defence ſet up by the underwriters, was, that the veſſel was not ſeaworthy; it was proved that the veſſel broke ground without a ſufficient complement of men for the voyage, and that ſhe was leaky; the Plaintiff endeavoured to ſhew, that the damage had been occaſioned by accidentally ſtriking on an anchor in the *Surinam* river; but ſome witneſſes proved that the ſhip's timbers were rotten, whereupon *Beſt* Serjt., for the Plaintiff, ſaid, he would admit that ſhe was not ſeaworthy, and would take his verdict only for a return of the premium, and accordingly, without the caſe being ſummed up to the jury, a verdict paſſed generally for the Defendant, upon the counts on the policy, without the jury ſpecially finding what was the defect which rendered the veſſel unfit for the voyage.

Shepherd Serjt. in this term obtained a rule *niſi* to ſet aſide the verdict and enter a nonſuit, upon the ground that the policy being "at and from *Surinam*," the ſhip was covered by the policy while ſhe was there, for that the

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the ſhip, though very defective in point of repair, or though deſtitute of hands, was ſufficiently ſeaworthy to lie alongſide of a quay in a river, and that if ſhe were ſeaworthy for the place and ſervice in which ſhe was then engaged, the policy attached on her while ſhe was in that port, and the riſk having once commenced, this was not a caſe in which the premium could be apportioned, but that the benefit of the policy became forfeited ſo ſoon as the ſhip proceeded on a ſervice for which ſhe had not been previouſly rendered ſeaworthy, and the premium remained entire to the Defendant.

Beſt and *Vaughan* Serjts. now, ſhewed cauſe. If the Plaintiff meant to put his caſe upon the deficiency of men only, he ſhould have diſtinctly put it ſo to the jury; but after they have found a general verdict, the Plaintiff cannot ſeparate the facts, and ſay the ſhip was ſeaworthy "at" *Surinam*, but not ſeaworthy "from" thence. The complement of men might be ſufficient at the port, although it was not ſufficient to ſail from thence, but if the fabric of the ſhip was not ſeaworthy for the voyage, it was not ſeaworthy "at" *Surinam*, for it was not repaired there. [*Lawrence* J. Suppoſe the veſſel had been burnt in the harbour at *Surinam*, would not the Plaintiff have been entitled to recover as for a total loſs? It is not neceſſary that at the time of the contract the veſſel ſhould be ſeaworthy for the voyage: ſuppoſe a ſhip repairing is burnt, would ſhe not be on the policy under the word "at"? The condition that ſhe ſhall be ſeaworthy for the voyage does not attach till her ſailing.] The jury having generally found that the ſhip is not ſeaworthy, the Plaintiff is entitled to a return of premium. The judgment of *Lawrence* J. in the caſe of *Chriſtie* v. *Secretan*, 8 *T. R.* 198. is ſtrong to this effect. As to the defect of ſeamen, at the very time of the loſs, the captain was on ſhore endeavouring to get more ſeamen, and the veſſel had not proceeded on her voyage to the point

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point, where it became neceffary to take on board the full complement. [*Mansfield* C. J. denied that there was any evidence given of an intention to take on board more feamen.]

Shepherd and *Peckwell* Serjts., in fupport of the rule, infifted that the jury were clearly fatisfied of the deficiency in the complement of men, and that their verdict proceeded upon that ground. That defect did not arife till fhe left the port; and unlefs it had appeared that the veffel was fo rotten that fhe was unfit to lie in harbour, the policy had attached long before the deficiency of men arofe, and there could be no return of premium. The fhip, although in want of repairs, was, without receiving any repairs, protected by the policy whilft in the port.

MANSFIELD C. J. This is a queftion in fact about the cofts, but there was very little difcuffion at the trial on the latter points. The queftion is, whether on an infurance at and from *Surinam*, the facts of this cafe entitle the Plaintiff to a return of premium. Now if the fhip failed without a fufficient number of men, certainly they do not. This cafe never went to the jury, but I believe they were perfectly clear on both grounds; as to the number of men, they certainly were. But with refpect to the other point, here is the fhip kept a month at *Surinam*, in loading, and to all appearance, in the judgment of mankind, certainly feaworthy, and if fhe had been funk or burnt there, the underwriters could have made no defence. And it would be very ftrange if this Plaintiff can fay, on its being proved that the fhip was not feaworthy when fhe finally failed, that therefore the feaworthinefs fhall be carried back to the time of her arrival at *Surinam*.

Rule abfolute for a Nonfuit.

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BLAGRAVE, Demandant; OWEN, Tenant; BLAGRAVE and Others, Vouchees.

The warrant of attorney to ſuffer a recovery of lands in a county palatine, cannot be taken before an attorney of the Palatinate Court of Great Seſſions.

SELLON Serjt. moved that a recovery might paſs as of this term. The warrant of attorney acknowledged by one of the vouchees, was taken before two commiſſioners, one of whom was deſcribed in the affidavit as an attorney of His Majeſty's Court of Great Seſſions at *Cheſter*: the other was an attorney of one of His Majeſty's courts at *Weſtminſter*. The rule of court, *Mich.* 39 *G.* 3. requires that no fine or recovery ſhall paſs, unleſs the taking of the warrants of attorney ſhall be before a Judge or Serjeant, or unleſs an affidavit be made and filed, ſtating that the commiſſioners taking the ſame, are either barriſters of five years ſtanding, or ſolicitors, or attorneys, of ſome of the courts of *Weſtminſter-Hall*, the Judges of the Court of Seſſion or Exchequer, or Advocates, or Clerks to the Signet, of five years ſtanding, in *Scotland.* But this rule, he ſaid, applied only to recoveries ſuffered of lands in *England*; and the premiſes in the preſent caſe were in the county palatine of *Cheſter*, which, he argued, was not within the reaſon of the rule, and was not, for this purpoſe, *quaſi England.* The Court were unanimous that *Cheſter* was in *England*, and refuſed either to let the recovery paſs as of this term, or to let the tenant's appearance be recorded as of this term, *de bene eſſe*, which he next prayed for.

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HADDOW *v.* PARRY.

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THIS was an action upon a policy of insurance effected by the Plaintiffs, therein declared to be agents, "upon specie or bullion, by any one or more of His Majesty's ships, lost or not lost, at and from *Jamaica* to *England*. The interest was averred to be in *James Auchie* and Co. Upon the trial of this cause, at the sittings after the last *Trinity* term, at *Guildhall*, before *Mansfield* C. J., a bill of lading was offered in evidence, signed by Lieutenant *Lawrence*, the commanding officer of His Majesty's schooner the *Rook*, of eight guns and twenty-five men, accompanied with proof of his death and hand-writing. In the margin was written, Bill of lading for 12,000 dollars, dated 12th *August* 1808, under which were copied the marks of the several chests, and their numbers and contents, describing them as containing 2,000 dollars each. The body of the bill of lading expressed to be "shipped in good order by *Dollar*, *Auchie* and Co., in and upon the good schooner called the *Rook*, six boxes, containing 12,000 dollars, being marked and numbered as in the margin, to be delivered at *London*, (the act of God, the King's enemies, fire and all and every other the dangers of the seas, rivers, and navigation, of whatever nature and kind excepted,) unto Messrs. *James Auchie* and Co., or to their assigns, they paying freight. In witness whereof the master or purser of the said schooner had affirmed to four bills of lading of like tenor. This instrument was signed, "contents unknown, *James Lawrence*, Lieutenant." The *Rook* was taken on the homeward passage by a very superior force, after a most gallant resistance, in which Lieutenant *Lawrence*, and four-fifths of his crew were slain, and the survivors taken prisoners. The Plaintiffs produced

A bill of lading, signed by a master of a vessel, since deceased, for goods to be delivered to consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods. Per *Lawrence* J.

But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee.

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duced no other proof of the contents of the chests, nor of interest in *James Auchie* and Co. than this bill of lading. At the trial no attention was paid to the protest of the master, signed at the bottom, "contents unknown;" but upon the whole effect of the instrument it was contended that it was no proof that the property was put on board, or that it belonged to *James Auchie*: and the Chief Justice being of that opinion, rejected the evidence, and directed a Nonsuit.

Shepherd Serjt. in this term obtained a rule *nisi* for a new trial, upon the ground that this evidence ought to have been received, it being similar to the entries of bailiffs in their accounts, and other entries whereby persons charge themselves, which are admitted as evidence of the facts which they state. The deceased must be considered as a steward for his owners. [*Mansfield* C. J. thought that the case of entries made by a dead vicar or rector, which the Court of Exchequer had long been in the habit of receiving, as evidence in favour of his successor, might be analogous.]

Lens and *Vaughan* Serjts. on a former day in this term shewed cause. They distinguished this from the case of a bailiff charging himself. They did not object to the bill of lading being received as evidence that the goods were put on board the vessel, but they objected to the ulterior use intended to be made of it, as declaratory of the persons in whom the property was vested. But even admitting that any declaration made between the consignor and the master would be evidence, this paper does not contain any declaration in whom the property is, for it is merely an undertaking to deliver to *James Auchie* and Co., or their assigns, so that whether the dollars belong to *James Auchie* and Co., or to *Dollar, Auchie* and Co. or to any other, does not by this

paper

paper appear. It is only evidence that the deceased master undertook to render an account to *James Auchie* and Co. The entry of a bailiff is only evidence of the precise fact that the tenant does pay rent for that land, it proves nothing further. That too is an excepted case, and no analogy can be drawn from excepted cases, it would only be extending the exception. [*Heath* J. Does not the master charge himself in this case with the receipt of the dollars?] Yes, but the paper only proves that he received them from *Dollar Auchie* to be delivered to *James Auchie*; it does not prove in which of the two the property is vested. [*Lawrence* J. You admit that in an action against third persons, this bill of lading would have been evidence of the receipt of the dollars by the master: would it not then have been equally evidence of property in the consignee in an action of trover for them against a third person, and not against the captain only? Could *James Auchie* (to whom, or whose assigns, the master undertakes to deliver the dollars,) assign them, if he had no property in them.] The authorities were very much considered in the late case of *Higham* v. *Ridgeway*, 10 *East*, 109. But it is not sufficient for the purpose of the present action, that this would be evidence to enable *James Auchie* to recover in trover: in the cases of *Camden* v. *Anderson*, 5 *Term Rep.* 712, and *Lucena* v. *Crawford*, 3 *Bos. & Pull.* 75. it was held that a person must have either the legal or the equitable title to goods, to enable him to support a policy of insurance, so that this paper may be evidence of a less than an insurable interest in *James Auchie*. [*Chambre* J. I see in the margin, the words "contents unknown;" it seems that the lieutenant who signed this, would not charge himself with any thing, and would not be accountable. *Mansfield* C. J. Those words were not read or noticed at the trial. If the master qualifies

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qualifies his acknowledgment, by the words contents unknown, he acknowledges nothing.]

Shepherd and *Best* Serjts., contrà. The principle on which the admiſſions of perſons againſt themſelves are evidence, is not confined to written entries. Proof of a declaration made by a man now dead, or proof of a written entry made by him, are alike tantamount to his being, if alive, called into the witneſs box, and ſaying, I received theſe boxes of dollars, contents as *per* margin, and I received them for the uſe of *James Auchie*. In the caſe of *Mac Andrew* v. *Bell*, 1 *Eſp*. 373., Lord *Kenyon* held that the admiſſion of the maſter of a veſſel put into the witneſs box of his ſignature to a bill of lading conſigned to the Plaintiff, was proof of intereſt in the Plaintiff upon a policy of aſſurance. The caſe of a ſteward is only *exempli gratia*, but entries are often evidence not only againſt, but for the maker. In the ordinary caſe of a bond, more than twenty years old, the obligor charges himſelf, by indorſement, with receipt of the intereſt, but this is ſo ſtrongly evidence for himſelf, that it will, at a ſubſequent period, rebut the preſumption of payment, becauſe the Plaintiff is in the like caſe as a dead man, and cannot be called as a witneſs.

Cur. adv. vult.

On this day the Court declared that the words, "contents unknown," rendered the bill of lading no declaration of what the cheſts of dollars contained: it was therefore no evidence at all, and they

Diſcharged the Rule.

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WILSON *v.* SERRES.

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If a Plaintiff knowingly arrests a married woman, the Court will make him pay the costs of the motion for her discharge.

MARSHALL Serjt. having obtained a rule *nisi* to discharge the Defendant, who was a married woman, out of custody,

Best Serjt. shewed cause, upon an affidavit that she contracted for the purchase of furniture, (for the price of which this action was brought,) as a single woman; and that when she disclosed that she was married, she also stated that she was separated from her husband, and had estates settled to her own separate use, and was answerable for payment of her own debts, and actually gave a bill of exchange for the amount of the debt, which was dishonoured.

Marshall, in support of his rule. The Plaintiff knew she was married when he arrested her.

The Court held that as he knew she was married, the taking a bill of exchange, and the arrest, were very wrong, and therefore made the

Rule Absolute with Costs.

GIBBS *v.* MERRILL.

Nov. 27.

In *assumpsit* a plea in abatement that the Defendant made the promise jointly with another, is supported by evidence that the promise was made by the Defendant jointly with an infant.

It is for the Plaintiff to plead and prove that the infant has avoided his promise, if he would reduce the joint contract to a sole contract.

THE Plaintiff declared on a bill of exchange, drawn by himself, and directed "to the Defendant, by and under the firm and description of Messrs. *Merrill*

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and *Le Blond, London,*" which bill the Defendant afterwards accepted. The Defendant pleaded in abatement, that the supposed promise, if any such was made, was made by the Defendant and one *Robert Le Blond*, jointly, and not by the Defendant solely, which *R. Le Blond* was still alive. The Plaintiff replied, that the promise was made by the Defendant solely, and not by the Defendant and *Robert Le Blond* jointly, whereon the Defendant joined issue. Upon the trial of this issue, at *Guildhall*, at the sittings after *Trinity* term, 1810, before *Mansfield* C. J., it was proved that *R. Le Blond* was party to the bill, but that he was an infant: the bill was accepted for the price of goods sold by the Plaintiff to the Defendant and *Le Blond*, who were partners in trade. *Le Blond*, being called, proved that he had never rescinded the contract. The jury found a verdict for the Plaintiff.

Shepherd Serjt. in this term obtained a rule *nisi* for a new trial, upon the ground, that *R. Le Blond* did promise, although his promise was voidable, and that it was proved that he had not avoided his promise.

Lens Serjt. on a subsequent day shewed cause. This is not a mere issue on the fact whether this bill were signed by the Defendant only, or by the Defendant and *Robert Le Blond* jointly, which can be decided by looking at the face of the bill; if this be not in law the contract of the infant, it may be pleaded as the contract of the adult party alone. It is not the less the contract of the Defendant alone, because another person has joined in it, whom the law will not permit to contract: when the fact of infancy is established, the infant ceases to be a joint-contractor: the issue therefore is rightly drawn, and proved according to its legal effect, 3 *Esp.* 76., *Chandler* v. *Parkes* and *Danks*. In an action

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of *assumpsit* against two, upon the general issue pleaded, the Plaintiff entered a *nolle prosequi* against one, who was an infant; and at the trial, Lord *Kenyon* C. J. held, that having declared upon a joint-contract, he could not recover against one Defendant only, when it was disclosed that the other was an infant. *Jaffray* v. *Freebairn*, *Wilson*, & *Black*. 5 *Esp.* 47. *Assumpsit* on a promise to carry the Defendant safely; *Black* pleaded infancy, on which the Plaintiff entered a *nolle prosequi* as to her. The other Defendants pleaded, that they, together with the Defendant *Black*, did not undertake. Upon the trial, Lord *Ellenborough* C. J., on the authority of *Chandler* v. *Parkes*, nonsuited the Plaintiff. *Trueman* v. *Hurst*, 1 *T. R.* 40., held that an action on an account stated, does not lie against an infant. [*Heath* J. In *Carth.* 160., *Williams* v. *Harrison*, it was held that it was a good plea in bar to an action upon a bill of exchange, though drawn by a trader, that he was an infant. *Lawrence* J. In *Trueman* v. *Hurst*, the Court only held that the infant should not be bound by the admission he had made during infancy, that the note was given for necessaries.] The judgment proceeds on the form of the count, that a Plaintiff can only recover against an infant upon a count expressly framed for necessaries found. [*Lawrence* J. No count ever expressly states that the Defendant is an infant.] 1 *Campb.* 552., *Williamson* v. *Watts*, infancy being pleaded to an action against the acceptor of a bill, the Defendant replied, it was accepted for necessaries, and *Mansfield* C. J. thought the action could not be maintained, and that the replication ought to have been demurred to, because an infant could not be liable as the acceptor of a bill. The argument for the Defendant is, that no third person can elect for the infant whether he shall rescind his contract, and that he has not made that election himself; but that argument is grounded on

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on the erroneous position, that a bill of exchange given by an infant, is not void, but merely voidable:, and at the trial *Taylor* v. *Croker*, 4 *Esp.* 187., was cited. But the case in *Carthew* shews that it is absolutely void. There is a distinction taken between bonds and single bills, because the bond has its operation by delivery, and therefore it shall take effect, unless infancy be pleaded to avoid it. *Russel* v. *Lee*, 1 *Lev.* 86.

Shepherd and *Best* Serjts. contrà. The issue was proved with the Defendant. An infant is capable of contracting: he may avoid the contract, but he also may, when he becomes of age, confirm it; if he contracts for necessaries, even during infancy, it is a complete binding contract; and the cases cited for the Plaintiff are consonant to this doctrine: the infant may bind himself for necessaries, he cannot bind himself by any new contract arising out of the contract for necessaries, as a bill, &c.: he may avoid it. The case put, of a bond, is conclusive for the Plaintiff; for if the contract of an infant were *ipso facto* void, he might give infancy in evidence on the plea of *non est factum*, but that is never permitted. Every thing which avoids a deed *ex post facto* must be specially pleaded: infancy must be pleaded to a bond, and it is not long since the practice ceased of pleading infancy specially in actions of *assumpsit*. A promise by an infant is not a nullity; it is at all times a good consideration to sustain a promise by another person to the infant. The promise of a feme covert is not such a consideration. [*Mansfield* C. J. *acc.*] This marks the distinction between a void and a voidable contract, *Holt* v. *Clarencieux*, 2 *Str.* 938., *Assumpsit* on a breach of promise of marriage: the Defendant pleaded that at the time of the promise the Plaintiff was an infant of fifteen years, to which plea the Plaintiff demurred, and it was urged that

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it was, *nudum pactum*, because the infant had the right of disagreeing to the contract at full age, and therefore her promise could be no consideration for the Defendant's promise: but *Holt* C. J. held the promise to be not void, but only voidable at the election of the infant, but that the party with whom an infant contracts has not this election, but is bound in all events, and judgment was given for the Plaintiff upon the demurrer. But if the promise of an infant were absolutely void, it could be no consideration for the promise of another. [*Mansfield* C. J. I do not know that: an obligation in honour is a consideration for a promise, though the honorary obligation cannot be enforced.] If there is nothing but an honorary obligation on the one side, and a legal obligation on the other, the honorary obligation is nothing, and cannot be enforced: there must be a promise founded on it: but there is in this case the promise of the infant, voidable but not void. That which is void is nothing, it does not exist: that which is voidable, may be rendered null by some subsequent act by the infant himself only, but it is also capable of confirmation by him. That which does not exist is not capable of confirmation. Perhaps even after the cause is decided on that ground, the infant may confirm his promise. It might have been competent to the Plaintiff to shew in pleading, if the case had been such, that the Defendant promised jointly with another, who was an infant, and that the infant had since avoided his contract, so that the Defendant continued liable alone; and it is important that it should be so pleaded, for many cases have happened in which the infant has afterwards ratified the contract, but it is not true that the Defendant originally promised alone. [*Mansfield* C. J. Shall the Defendant, who, if the other party to the bill be an infant, has practised a gross fraud on the Plaintiff, in passing to him a bill, to which he has procured an infant to set

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his name, be permitted to take the objection?] It does not follow that the Defendant is guilty of a fraud in so doing: it is not of necessity that he knew the other was an infant; the infant may, when he comes of age, ratify the contract; but if he avoids it, that does not the more prove it to have been a void contract in the commencement. But at all events it is not competent for a stranger to come in and say that the contract made by the infant is void in law. If the infant declares he does not chuse to make the objection of infancy, and to call for the protection of the law, another cannot do it for him. *Taylor* v. *Croker*, 4 *Esp.* 187. *Assumpsit* against the acceptor on a bill drawn by *Eversfield* and *Jones*, payable to the drawers, and by them indorsed to *Sizeland*, and by him to the Plaintiff. The Defendant proved that both the drawers were under age, and that they delivered the bill to *Sizeland* to be discounted, who had misapplied the money to his own use. *Eversfield* had demanded the bill from the Plaintiff, who refused to give it up. The Defendant contended that under these circumstances the note was void, but Lord *Ellenborough* C. J. thought, that if the action were against the drawers, there might be weight in the objection; for they might claim from the Court the protection of their infancy; but that though the Defendant derived title under them, the note was not to be considered as void in his hands, because the infants might possibly make themselves liable by a subsequent confirmation of their engagement, after full age. If the Plaintiff may not now declare upon the joint contract and recover, it would follow that if, after the infant came of age and confirmed his contract, the Plaintiff should still sue the other Defendant only, that Defendant would have no right to insist that the joint contractor ought also to be sued along with himself, but would be put to his separate action afterwards for contribution.

Lens

Lens replied, upon the case of *Holt* v. *Clarencieux*, that the Plaintiff did not bring that action until after she had attained twenty-one years, and confirmed her contract; the Plaintiff in this case, if he would have the contract not void, might have waited till *Le Blond* has attained twenty-one, and seen whether he would confirm this contract; but in the mean time he is entitled to sue only the Defendant.

Cur. adv. vult.

Upon this day, *Mansfield* C. J. (in the absence of the reporter,) gave judgment (*a*).

If the Defendant and *Le Blond* had both been sued and had pleaded *non assumpsit*, the verdict must have been for the Defendant, because the contract is void as against one. It is a gross fraud if the Defendant knew the other to be an infant, but I am afraid the cases are in favour of the Defendant. The Plaintiff has not taken the right course to enforce the bill. I never could understand the rule of law that an infant's contract was not void, but voidable. The rule that he is liable for necessaries, is plain enough: but it does not seem clear, in other cases, in what manner he is to avoid his contract. He may do it, indeed, by plea, but it does not seem necessary that he should do any previous act to avoid it. It seems, however, that the contract is not void, till the infant says that it is void. If it is not void, on this plea in abatement, we cannot say that the contract was not made by two persons. Therefore the verdict is wrong. According to a case in 2 *Vin. Abr. p.* 68. tit. *Actions, Joinder*, (D. d.) *pl.* 8., which cites *Bro. Ab. Dette* 191. (*perperam* 190) (*b*), the Plaintiff should have replied that the

(*a*) *Ex relatione Servientis Peckwell.*

(*b*) The case in *Bro. Ab. Dette* 191. (*perperam* 190.) is as follows:

DEBT on bond by the Abbot of *D.*, who shews that the bond was made to himself and to *J. N.*, and that *J. N.* was his commoign at the time, &c.; and there-

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the other joint contractor was an infant, and the Defendant muſt either have admitted it, or denied it.

Rule abſolute for new trial.

Lens then obtained a rule *niſi* for liberty to amend his replication.

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therefore it was held to be well by the Court, for there is a diverſity where a bond appears to be void, and where it does not: for where an infant and a man of full age were bound, or a feme covert by a ſtrange name, there the action ſhall be brought againſt both, and they ſhall have advantage by way of plea of the nonage, coverture, and profeſſion; but where one of them is named feme covert or commoign in the bond, there it is otherwiſe; for in the firſt caſe the infant may admit the bond, and ſo may the woman after the death of her huſband, and the monk after his deraignment; but where a man is bound to the Abbot and *J. N.*, not ſtyling him monk in the bond, nevertheleſs the Abbot alone ſhall have the action, and ſhall ſurmiſe that the other obligee was his commoign at the time, &c.; which note, for the judgment; and if one be bound to two, and one of them die, the other ſhall have his action alone, and ſhall ſurmiſe in his count that the other is dead; and if two are bound to one, and one of the two dies, the obligee ſhall have his action againſt the other, and ſhall count that the other obligor is dead. Cites "32 *H.* 6. 30." The folio cited ſeems not to be in point, and is probably a miſtake for "*Mich.* term 32 *H.* 6. *pl.* 6. The prior of *Ely* ſued out a writ againſt a man, and counted, by *Wangforde*, that the Defendant was bound to himſelf and to one *J.*, his co-canon, a ſacriſt of the ſame place, in the ſum contained in the bond; and ſhewed beſides, that the ſacriſt was his co-canon, for that the bond was made to himſelf and ſuch an one, ſacriſt of the ſame place. *Littleton*, for the Defendant, pleaded a preſcription for all the ſacriſts of the ſame place, to be impleaded and to plead: and the queſtion was, whether the plea were well pleaded by way of preſcription; no objection being made to the declaration; *Littleton*, by the advice of the Court, imparled.

ANONYMOUS.

Nov. 28.

A motion to put off a trial in *London* or *Middlesex*, on account of the absence of a witness, cannot be made when there is not time to shew cause within the term, if the party applying, had it in his power to come earlier.

BEST Serjt. moved on this last day of the term, for a rule *nisi* to put off the trial of this cause, for the absence of a material witness, who six weeks since went to *Morpeth* in *Northumberland*; the notice of trial was given on the 21st of *November*, for the *Middlesex* sittings after this term. Notice of this motion was given to the opposite party on the night of the 27th.

MANSFIELD C. J. The intention of the rule of practice is, to prevent the time of the judge, who sits at *nisi prius*, from being occupied with discussing these motions. But if a rule *nisi* is granted now, cause must be shewn at *nisi prius*, which equally occupies the time of the Judge: the having given him notice last night, is not sufficient to bring him into court this morning to shew cause: you might have made this motion a week since, and then he would have had sufficient time to shew cause within the term.

Rule refused.

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PHILIP THOMAS WYKHAM Esq. v. SOPHIA ELIZABETH WYKHAM and Others.

The testator devised certain lands, part mortgaged in fee, and part unincumbered, to trustees and their heirs, to pay debts in aid of the personal estate, and devised the surplus, and all his other lands, &c. to his first and other sons successively for life, with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life, with several remainders successively to the first and other sons of the bodies of the testator's several sons, in tail male, with like remainders to his daughter for life, to trustees, &c. and to her first and other sons successively in tail male: with a proviso that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seised and possessed, *to trustees*, on trust by the rents and profits to pay a jointure to any wife, &c. *for the term of each such wife's natural life only*. There were also powers by deeds to charge the lands with younger children's portions, and to lease for 21 years. While the mortgages remained outstanding, and the trusts for payment of debts unperformed, the eldest son, by deed, reciting the will and power, conveyed lands to *trustees and their heirs*, on trust by the rents and profits to raise and pay a jointure to his wife, *during her natural life only;* and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment against the settlor and testator, during the wife's life: This Court held, that by such deed the trustees of the jointure took no legal estate.

THE Right Honorable *Philip* Lord *Wenman* being seised in fee of divers real estates, and entitled in fee to the equity of redemption of certain other real estates, then mortgaged in fee to *Agatha Child*, by his will, dated the 4th day of *May* 1758, and duly executed and attested, devised part of the same several estates to *George Harvey* and *Francis Bassett*, and their heirs, upon trust, by and out of the rents and profits, or by sale, from time to time as to them should seem most convenient, and also by virtue of the power thereinafter given to them to cut, fell, and dispose of coppice woods, to raise money sufficient to discharge such of the testator's debts and legacies as his personal estate would not be sufficient to pay; and as for such parts of the hereditaments so given to the trustees, which should remain after the trusts should be performed, he devised them, and all other his freehold hereditaments in the counties of *Oxford*, *Kent*, and *Bucks*, or elsewhere in *England*, to his eldest son the Honorable *Philip Wenman*, for his life, sans waste; with remainder to *Thomas Whorwood* and *John Clarke*, and their heirs, during the life of

Philip

Philip Wenman, to preserve subsequent estates; with remainder to the first and other sons, successively, of the body of *P. Wenman* and their heirs male; with remainder over, for default of male issue, to *Thomas Francis Wenman*, his youngest son, for his life, sans waste; with remainder to the same trustees and their heirs, during his life, to support the subsequent remainders; with remainder to his first and other sons successively in tail male; with remainder to the testator's third and other sons successively in tail male; with remainder in default of all such his issue male, if he should have any other daughter than *Sophia Wenman*, to his daughter *Sophia* and such other daughters in tail general, as tenants in common, and if no other daughter than *Sophia*, then to her for life, sans waste; with remainder to the same trustees and their heirs during her life, to preserve contingent remainders; with remainder to her first and other sons in tail male, with divers remainders over, and with the ultimate remainder to the right heirs of the testator. The will contained a proviso, "that it might "be lawful for each of his sons, *P. Wenman* and *T. F.* "*Wenman*, and every other his son, when and as they "should respectively become entitled to the premises or "any part thereof, in possession, from time to time to "grant, convey, limit, or appoint all or any part or "parts of the premises whereof they should respectively "be so seised and possessed, *to trustees*, upon trust, by the "rents and profits thereof, to raise and pay any yearly "rent-charge not exceeding the sum of 1000*l.*, for a "jointure for any wife or wives that he or they should "happen to marry, for the term of each such wife's "natural life only; and a further power for them, in "like case, by any deed or deeds, &c. or by his, or "their, or any of their *will or wills*, &c. to charge "all or any part or parts of the premises whereof he or "they should be so severally seised and possessed, with "sums

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"sums of money for daughters or younger children's "portions; (that is to say,) for one such daughter or "younger child, five thousand pounds; for two such, "eight thousand pounds; and for three or more, ten "thousand pounds; with such maintenance, not ex- "ceeding the interest of the respective portion or por- "tions at four *per cent.*, as his sons should respectively "by such deed or deeds, will or wills, appoint." There was also a proviso, "that it might be lawful for his "sons, when and as they should come into possession "of the hereditaments so devised to them for life, by "indenture to lease all or any part or parts thereof for "any term of years not exceeding twenty-one years in "possession, so as in every such lease there should be "respectively reserved and made payable during the "continuance thereof, to be incident to and go along "with the reversion or remainder of the premises, and "expectant thereon, so great a yearly rent as could be "reasonably gotten." The testator died in *August* 1760, leaving two sons only, viz. *Philip* Lord *Wenman*, "and *Thomas Francis Wenman*; and one daughter, *Sophia Wenman*. *Philip* Lord *Wenman*, the son, became of age in *April* 1763, and was thereupon let into possession of all the testator's real estates, and enjoyed them till his death. In 1766, by indenture tripartite, duly attested, dated the 28th *June* 1766, and made between *Philip* Lord Viscount *Wenman* of the first part, Lady *Eleanor Bertie* of the second part, and *Willoughby* Earl of *Abingdon* and *John Morton* Esquire, of the third part, thereby reciting the said recited will, and the proviso whereby he was entitled to make a jointure out of the said estates upon a wife, and to make a provision for daughters or younger children; and that a marriage was then intended to be shortly had between Lord *Wenman* and Lady *Eleanor Bertie*, and for making such jointure for her in case she should after the marriage survive her

intended

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intended husband, as he was empowered to make by virtue of the same will, he, the said *P.* Lord Viscount *Wenman*, pursuant to and by force and virtue of the said power, and of all other powers, &c. did grant, convey, limit, and appoint, unto the Earl of *Abingdon* and *John Morton*, all his hereditaments devised to him by the said will in the counties of *Oxford* and *Bucks*, or elsewhere in *England*, to hold the same hereditaments unto the said Lord *Abindgon* and *John Morton*, and their heirs, upon trust by the rents and profits thereof to raise and pay unto the said Lady *Eleanor Bertie* and her assigns, during her natural life only, the yearly rent-charge of 500*l*, by quarterly payments, clear of all reprizes, for her jointure, in case the marriage should take effect, and she should survive Lord *Wenman*, and to be in bar and satisfaction of dower: and in consideration of the marriage, and for the making such provision for his daughter or daughters, younger child or children, as he was in that case authorized and empowered to make by virtue of the said recited will, the said *P.* Lord *Wenman*, pursuant to and by virtue of the said recited power, and of all other powers, &c. did by such deed charge all the premises in *Oxford* and *Bucks*, devised by the said recited will, (subject to the said jointure,) with the payment of the several sums therein mentioned. And the settlor covenanted with the trustees, their heirs and assigns, that he then had in himself good right, full power, and lawful and absolute authority, to make such grant, settlement, limitation, appointment, and charge; and further that the said trustees, in case the intended marriage should take effect, and the said Lady *Eleanor Bertie* should survive him, should from time to time and at all times after his decease, *during her natural life only*, peaceably and quietly enter into and enjoy the premises thereinbefore granted, limited, and appointed to them as aforesaid, and receive and take so much of the rents and profits

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profits thereof as should be sufficient to pay the yearly rent-charge of 500*l.*, without the lawful let, eviction, or interruption of the settlor, his heirs or assigns, or any claiming under or in trust for him or the late Lord *Wenman.* By indenture of the 26th day of *December* 1782, and made between the settlor, and the Earl of *Abingdon* and Sir *J. W. Gardiner* Bart., duly attested, reciting the aforesaid will and settlement, and that Lord *Wenman* was desirous to make a further provision for Lady *Eleanor Wenman* of the clear yearly rent-charge of 300*l.* a year, in addition to the sum of 500*l.* a year before settled, for making such further jointure,' the settlor pursuant to, and by virtue of the same jointuring power, and of all other powers, &c. and in further exercise and execution thereof, did grant, convey, limit, and appoint, unto the said Earl of *Abingdon* and Sir *John Whalley Gardiner*, and their heirs, all such parts of the hereditaments devised to the settlor by the said recited will as were situate in the county of *Oxford*, to hold the same hereditaments unto the trustees and their heirs, upon trust, by the rents and profits thereof to raise and pay unto Lady *Eleanor Wenman* and her assigns, during her natural life only, the further rent-charge of 300*l.*, as and for an addition to the jointure of 500*l.* secured to her by the therein-recited indenture, in case she should survive her said husband, with the like covenants as in the last-recited deed, for the settlor's right to make such further grant, limitation, settlement, appointment, and charge, and for quiet enjoyment by the trustees against the settlor and the testator. And by another similar indenture, dated the 1st of *December* 1796, and made between the said settlor of the one part, and Sir *William Henry Ashhurst* Knt. deceased, and Sir *John Whalley Gardiner* of the other part, the settlor further granted, &c. unto the last-mentioned trustees and their heirs, so much of the hereditaments devised to him by the said will, as were situate in the county

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county of *Oxford*, and in *Pounden*, in the parish of *Twyford* in the county of *Bucks*, to hold unto the trustees and their heirs, upon trust, by the rents and profits thereof, to raise and pay unto *Eleanor* Lady *Wenman* and her assigns, during her natural life only, the further yearly rent-charge of 200*l.*, as and for an addition to the jointure of 500*l.* and 300*l.* before secured to her, with the like covenants as in the lastmentioned indenture. *Thomas Francis Wenman*, the second son of the testator, died in 1796, unmarried, and without issue, in the lifetime of *P.* Lord *Wenman*, his brother, and on the 26th of *March* 1800, the same *Philip* Lord *Wenman* died, without leaving any issue, and leaving *Eleanor* Lady *Wenman* him surviving. *Sophia Wenman*, the only daughter of the first named Lord *Wenman*, intermarried with *William Humphrey Wykham* deceased, and having survived him, she died in *March* 1792, leaving issue, *William Richard Wykham*, her eldest son; *Philip Thomas Wykham*, the Plaintiff; and *Harriet Mary Wykham*, who intermarried with *Willoughby Bertie*, one of the Defendants. By indentures of lease and release, of the 1st and 2d days of *January* 1799, the release made between *William Richard Wykham* of the one part, and *William Walford*, gent. of the other part, the said *William Richard Wykham* conveyed to the said *W. Walford* and his heirs, the life estate of him the said *William Richard Wykham*, expectant on the decease of the said *P.* Lord *Wenman*, and the estate or uses by the will of the said *Philip* Lord *Wenman* deceased devised to the son or sons of the then present *P.* Lord *Wenman* successively in tail male, of and in all the manors and hereditaments of or to which the said *W. R. Wykham* was seised or entitled for an estate tail under or by virtue of the said will, in trust for *William Richard Wykham* and his assigns during his life, to prevent any wife of the said *W. R. Wykham* from being entitled to dower out of the same premises.

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W. R. Wykham, on the death of the late Lord *Wenman*, was let into possession of all the testator's real estates and hereditaments not sold by the trustees under the will, and enjoyed the same until his death; and by indentures of lease and release of the 20th and 21st days of *June* 1800, the release made between *William Walford* of the first part, *W. R. Wykham* of the second part, *William Meyrick* of the third part, *William Broderip* of the fourth part, and *Richard Chapman* of the fifth part, all the manors and hereditaments of him the said *W. R. Wykham*, which came or descended to him under or by virtue of the will of his grandfather, *P.* Lord *Wenman*, in the counties of *Oxford*, *Bucks*, and *Kent*, were granted and conveyed by *William Walford* and *W. R. Wykham* unto *W. Meyrick*, his heirs and assigns, to make him tenant to the precipe, in order that common recoveries might be had and suffered thereof. Recoveries were in, or as of *Trinity* term 1800, suffered of the same premises, in which *W. Broderip* was demandant, *W. Meyrick* tenant, and *W. R. Wykham* was vouchee. *Eleanor* Lady *Wenman* was living when the indentures of the 20th and 21st days of *June* 1800 were executed, and the recoveries suffered. *W. R. Wykham* died after the suffering such recoveries, viz. on the 1st of *July* 1800, leaving the Defendant, *Sophia Elizabeth Wykham*, his only daughter and heiress at law; and she is now the heiress at law of *Philip* Lord *Wenman* the testator. *The mortgages are still unsatisfied and outstanding, and all* LORD WENMAN *the testator's debts are not yet paid.* The Complainant filed his bill against the Defendants in the Court of Chancery, insisting that the estate in tail male limited by the will of the testator *P.* Lord *Wenman* to the first and other sons of the body of his daughter *Sophia*, was not barred by the said recovery, and praying that he might be declared entitled to an estate tail under that will in all the estates thereby devised, and that pos-

-ſeſſion thereof might be delivered to him accordingly, and praying an account of the rents and profits thereof, accrued ſince the deceaſe of *W. R. Wykham*, and that the Earl of *Abingdon* and Sir *William Henry Aſhhurſt*, who were the ſurviving truſtees in the aforeſaid jointure deeds, might, without prejudice to the jointure of Lady *Wenman*, (who was then living, but is ſince dead,) or any other charges or incumbrances affecting the ſaid eſtates, be directed to convey and aſſure the ſame to the Plaintiff, or as he ſhould direct; and that in ſuch manner, that he might be enabled to ſuffer a good and perfect recovery thereof. Upon the hearing for further directions on the 18th of *May* 1810, the Lord Chancellor directed this caſe to be ſtated; and the queſtion therefore for the opinion of this Court was, whether the truſtees named in the deeds of appointment of the 28th *June* 1766, 26th *December* 1782, and the 1ſt of *December* 1796, or any of them, took any and what eſtate and intereſt in the manors, lands, and hereditaments in queſtion, of which the Right Honourable *Philip* Lord *Wenman*, the teſtator, was ſeiſed in fee ſimple at the time of making his will, and which were thereby given to the Honourable *Philip Wenman* his ſon (afterwards *Philip* Lord *Wenman*) for life; or any of them.

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S. Shepherd for the Plaintiff, *P. T. Wykham*;
J. Lens for the Defendants.

Shepherd Serjt. for the Plaintiff. The effect of theſe ſettlements, coupled with the power, if indeed they had any legal effect at all, muſt be, that the truſtees took either an eſtate in fee, or an eſtate *pur autcr vie*, for the life of Lady *Wenman*, or a chattel intereſt. The true conſtruction is, that they took an eſtate *pur auter vie*. The important enquiry is, what was the effect of the firſt ſettlement; for if any eſtate paſſed thereby, the ſubſequent deeds, the limitations of which are merely co-

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co-extensive with those of the first, could pass no further legal estate in the premises, inasmuch as the legal estate would already be vested in the trustees of the first settlement. If indeed there had been any difference in the deeds, so that they created different uses and consequences, there might be some ground to argue that some estate passed to the trustees by the last deeds: but here none could pass, whether a fee or an estate *pur auter vie* were created by the first deed, not, if a fee, because the whole legal estate would be exhausted by the first settlement, not, if an estate for life, because at the moment when the estate *pur auter vie*, created by the first deed, ceased by the death of Lady *Wenman*, the like estates granted by the second and third deeds would also be passed and gone. Perhaps the first deed, considered as a conveyance, would not pass any estate: but in the execution of a power, the appointee does not take his estate under the deed which executes, but under the deed which creates the power; it is the same thing as if the uses of the appointment were to be engrafted into Lord *Wenman*'s will. It is clear that the successive devisees take legal estates under the devise. If both the sons had succeeded to the estates, and married, they might successively have executed this jointuring power, and each of them would thereby interpose a new legal estate before the estates of the subsequent remaindermen. The effect would be the same, as if the testator had devised to his eldest son for life, remainder to these trustees and their heirs during the life of Lady *Eleanor Bertie*, in trust to raise and pay to her 500*l.* *per annum* for her jointure during her life only, remainder to the first and other sons of the body of *Philip* Lord *Wenman* in tail. This would have created a mere rent-charge during Lady *Wenman*'s life, but it would have sufficed for all useful purposes. The testator could not have interposed here a fee-simple to the trustees of the jointure, without defeating all the subsequent limitations of his

his will, and turning them all to mere equitable eftates; fo to conftrue the appointment, therefore, would be putting a conftruction upon the will, directly contrary to the intentions of the teftator, whofe purpofe evidently it was to give a legal eftate to all the devifees for their feveral lives, and to their children in tail; and this intent muft be upheld and effectuated, except fo far as it is abfolutely neceffary to difplace the eftates devifed, in order to give place to the new ufes engrafted by the execution of the power. The words "heirs" being added after the names of the truftees, does not the more make this a fee-fimple in them: for if the word heirs were wanting, the Court would fupply it, that the eftate might not be an eftate for the joint lives of the truftees and the jointrefs, whereby the purpofe of the fettlement would be defeated, if they fhould die during her life. The Court will fo conftrue an appointment, as beft to effectuate the purpofe of the appointor. In the cafe of *Venables* v. *Morris*, 7 *T. R.* 342., the Court held that the truftees there took a fee, becaufe that beft effectuated the intention of the fettlor; but there are feveral cafes where a fee-fimple, primarily given, has been reduced to a lefs eftate by the fubfequent provifions of the deed, that conftruction being neceffary in order to effectuate the intentions of the parties. In order to eftablifh this as a fee, the Defendant will be forced to contend that when words are once ufed, as here, conveying a fee, no fubfequent language of the fame deed can cut it down to an eftate *pur autre vie*. But if he cannot fuccefsfully contend this, the fee in the prefent cafe is clearly reduced to an eftate *pur auter vie*, by that which follows. The truft is, to pay the rent-charge to Lady *Wenman* during her natural life only. To effectuate this truft, no greater eftate than an eftate for her life is requifite. An eftate *pur auter vie* is moft ftrictly and technically expreffed by an appointment to *A.* and

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his heirs during the life of *B*. If it were merely to *A*. during the life of *B*, that would be an eftate for their joint lives only. By conftruing this to be an eftate in fee, all the fubfequent limitations of the will are not merely poftponed, they are abfolutely altered and deftroyed; for they are all thereby turned to equitable eftates: but if it is conftrued to be an eftate *pur auter vie*, then they are merely poftponed during the life of the jointrefs, and will fuccefsively take effect as legal eftates, when the jointure ceafes. *Jones* v. Lord *Say & Sele*, 8 *Vin*. 262. *S. C.* 1 *Caf. Eq. Abr.* 383. 3 *Bro. P. C.* 458. "A devife to truftees and their *heirs for ever*, upon truft out of the rents to pay feveral legacies and annuities, and after reimburfing themfelves their cofts, fhe doth appoint her truftees to pay all the refidue of the rents to the proper hands of her daughter *Cecil Fiennes*, for her life, and after her deceafe the truftees to ftand and be feized of the premifes to the ufe of the heirs of the body of *Cecil Fiennes*, feverally and fucceffively, and to the heirs of their refpective bodies in tail male. Lord *King*, Chancellor, held that the ufe was executed in the truftees and their heirs, during the life of *Cecil Fiennes*, and that fhe had only a truft in the furplus of the rents and profits; but that by the fubfequent limitation, the ufe was executed in the perfons entitled to take by virtue thereof, chargeable with the payment of the annuities." The reafon of this judgment evidently was, becaufe a life eftate fufficed for the purpofes of the truft. [*Mansfield* C. J. In that cafe it was never fuggefted that an eftate *pur auter vie* in the truftees would fuffice for the purpofes of the truft. It does not appear by the report in *Viner*, whether there were any folid legacies given by that will, or whether there were merely annuities: if they were annuities, the truftees muft have taken an eftate during the lives of the annuitants and the furvivor of them, as well as during the life of *Cecil Fiennes*, in

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order to effectuate the trusts of the will.] It is not incumbent on the Plaintiff to dispute that. [*Lawrence* J. I well remember, that upon that case being cited (*a*), Lord *Kenyon* C. J. said, it was a case by itself, and he seemed to think it would have been better to hold that the trustees took the fee, and that both the estates limited to the widow were equitable, and might have been united.] *Doe ex dim. Compere* v. *Hicks*, 7 *T.R.* 433. The question was, whether a devise to trustees and their heirs, to preserve contingent remainders, but nevertheless to permit and suffer the tenant for life to receive the rents and profits during his life, with remainder to his first and other sons in tail male, conferred on the trustees the fee, or an estate *pur auter vie*. Upon failure of the issue of the tenant for life, there was a remainder to another tenant for life, followed by the like limitation; and these circumstances justified the Court in saying, that the testator meant to devise to the trustees an estate *pur auter vie* only; for if the first devise to preserve contingent remainders, gave them the fee simple, the second could give them no legal estate, so that such a construction would be inconsistent with the subsequent limitations. In like manner the devisor's general intent in the present case, requires that the trustees should take an estate for life only; for he gives the same powers to all the subsequent remainder men to create the like estate as the first, which would be inconsistent with the first execution of the power, if the first had created an estate in fee. It may, however, be the case, that the words purporting to grant an estate in fee are an excessive execution of the power, and it will be argued that therefore the appointment shall be bad *in toto*. But that will not follow, even if that part of it should be bad for excess:

(*a*) Probably in the case of *Harton* v. *Harton*, 7 *T. Rep.* 654. And see *Doe d. Leicester* v. *Biggs*, *ante*, vol. 2. p. 110.

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for appointments are matters *fui generis*, and not to be conftrued by the fame rules as other conveyances. Perhaps this inftrument, which is not a leafe and releafe, confers no legal eftate. But the covenant for quiet enjoyment, even if it ftood alone, would operate as a good appointment: if it were, "I appoint *A.* and *B.* truftees, and I covenant that they may enter and quietly enjoy during the life of Lady *Wenman*;" that would be a good appointment of an eftate for her life. [*Heath* J. A covenant to ftand feifed to ufes has been held to operate as a good appointment.] Yes, *King* v. *Melling*, 1 *Vent.* 228. There was a power to make a jointure: the devifee covenanted to ftand feifed to the ufe of himfelf for life, and after his deceafe to the ufe of his wife. It was a queftion what eftate the devifee took by the devife, whether an eftate for life, or in tail, and he fuffered a recovery previous to entering into this covenant. *Rainsford* J. thought he took an eftate tail by the devife, and had fince acquired the fee, and that as he had both an intereft and a power, the ufe fhould arife out of his intereft, and not be executed by virtue of his power, according to *Cleer's cafe*, 6 *Co.* 18. But *Hale* C. J. held that he took an eftate tail, and that though the jointure were here by covenant to ftand feifed, (an improper way to execute his power,) yet it might be conftrued an execution of it. *Michs.* 51. in that court, *Stapleton's* cafe, where a devife was to *A.* for life, remainder to *B.* for life, remainder to *C.* in fee, with power to *B.* to make his wife a jointure. *B.* covenanted to ftand feifed for the jointure of his wife, reciting his power. Though this could not make a legal jointure, yet it was refolved to enure by virtue of his power. *Quando non valet quod ago, ut ago, valeat, quantum valere poteft.* But in the principal cafe *Hale* C. J. held, that *Bernard* had got a new fee, which though it were defeafible by him in the remainder, yet the cove-

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nant to ſtand ſeiſed ſhould enure thereon, and the uſe ſhould ariſe out of the fee." Therefore, as in *Stapleton*'s caſe a covenant to ſtand ſeized was a good execution of the jointuring power, ſo here, if the grant to the truſtees and their heirs be an exceſſive execution, the covenant for quiet enjoyment during the life of Lady *Wenman*, will operate as a good appointment. That covenant indeed gives the truſtees no action on account of any interruption that may take place after the deceaſe of Lady *Wenman*, but during her life the ſettlor covenants, not for his own acts merely, but for the acts of all claiming under the teſtator. This indicates the intention of granting a life eſtate only; for this covenant extends to the acts of all the remainder men in tail, againſt whom, if he meant to give a life eſtate, he may ſafely covenant, for while the jointure is ſerving out of a life eſtate, they have neither of them any right to enter; but if he had created a fee, he would have been covenanting for their perpetual forbearance, during an eſtate, which he had no right to create. *Curtis* v. *Price*, 12 *Veſ.* 89. Lands were conveyed to truſtees and their heirs, to the uſe of the huſband *ſans* waſte, for life, and from his deceaſe to the uſe of the wife for life, if ſhe continued ſole, and if ſhe ſhould marry, to the uſe of the truſtees and their heirs, upon truſt out of the rents, to pay her 50*l.* yearly during her life, and with the reſidue of the rents to maintain the children of the marriage, and after the deceaſe of the huſband and wife, to the uſe of the ſame truſtees and their executors for one hundred years, (which was a truſt for raiſing 500*l.* for younger children's portions,) with remainder to the uſe of the heirs of the body of the wife by her ſaid huſband, and for want of ſuch iſſue, to the right heirs of the huſband for ever. *Grant M. R.* held, that the Court was authorized to read the ſettlement, as if the words "during the life of the wife" had been inſerted. He ſaid

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said the case of *Doe d. Hicks* v. *Compere* was very much in point, and in the case before him there was, first, what existed in that case, a purpose to be answered, for which an estate in the trustees during the wife's life would be sufficient, and next, a limitation for a term of years, which could not arise consistently with the estate in fee in the same trustees. Therefore, not only was the case similar to that of *Doe* v. *Hicks* in the particular on which the Court proceeded, but was stronger, as the intention not only would not be answered, but would be contradicted, unless the Plaintiff's construction were put on the general words of the limitation to the trustees." His Honour's judgment did not happen to depend ultimately on this point. It will perhaps be contended that in the present case there is neither a fee nor an estate for life given, but some kind of chattel interest; but that is here impossible, because the trustees are empowered to enter during the life of the jointress only, and there is no case in which the Courts have held, that an estate given to trustees is a chattel interest, where the measure of the duration, is, as here, the duration of human life. In some cases, a fee may be limited down to a chattel interest: a tenancy by elegit, a devise to trustees to raise a sum of money, are chattel interests, although their duration is uncertain. Whether this rent-charge might have been conveniently secured by the creation of a chattel interest, and whether the Court of Chancery, if the matter had been submitted to their direction, would have ordered that mode to be pursued, it does not profit to enquire, but the estate granted is not to be changed by construction from a freehold to a chattel interest, even if the latter mode would have been rather the more convenient. If it be urged that it is a chattel interest, because the jointure may be in arrear at the time of Lady *Wenman's* decease, and that if it were an estate *pur auter vie*, the trustees could

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could never after enter to levy them, Lord *Ellenborough* C. J. suggests the proper answer, in the case of *Doe d. White* v. *Simpson*, 5 *East* 162., that the Court may presume a chattel interest to arise on the decease of the jointress, sufficient in duration to secure the payment of the arrears; though perhaps even that is unnecessary, for if the widow were to die in the middle of a quarter of a year, her executors would, under the statute 11 *G.* 2. *c.* 19. *s.* 15., be enabled to recover the rent-charge for the fractional part of the quarter elapsed since the last day of payment; and an argument which goes to more than that fractional part, goes on the supposition that the trustees have been guilty of laches in not enforcing the payments quarterly as they accrued due, which laches the Defendant is not entitled to assume as the ground of his argument. [*Mansfield* C. J. Has it ever been determined that the executor of a tenant *pur auter vie* is entitled to recover a portion of the rent from the last quarter-day under that statute? He is certainly within the mischief, for otherwise the tenant of the land may keep the rent for his own benefit.]

Lens Serjt. contrà. It may be doubtful whether this instrument conveyed any estate at all to the trustees: and whether it were not void, not merely for the excess of execution in attempting to convey a fee, but therefore void in *toto*: but if it conveyed any estate, it either conveyed a fee, or else merely a chattel interest. In either of these three cases the Defendant must succeed. The hypothesis of an estate *pur auter vie* involves all the difficulties attendant upon the Defendant's argument, and some others peculiar to itself. The question is not, whether the creation of a freehold estate less than a fee might have sufficed, but whether the grant of a fee be not a good execution of the power. The objection raised

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raiſed to a fee, is, that it would counteract all the teſtator's intention by making all the ſubſequent eſtates equitable. But though it might be to a certain degree inconvenient to change a legal to an equitable eſtate, yet the real and ſubſtantial part will not be at all affected by it: and if it be good, the recovery will prevail, and all the ſame conſequences follow. If the Court can look to the intention of the parties, it will look to the conſequences, as tokens to be called in aid, in developing thoſe intentions. If there be equal difficulties attendant on both conſtructions, the Court will rather make ſuch an election between them, as not to deprive theſe perſons of the right of ſuffering a recovery without aſking the concurrence of parties, who in truth have nothing to do with the eſtates. This eſtate was much incumbered with mortgages, ſome for terms of years, a very ſmall part of them, in fee. If a doubt ariſes, whether the eſtate of the truſtees is for the life of the jointreſs only, let it be conſidered whether the property was in ſuch a condition, that the truſtees could, at the creation of their eſtate *pur auter vie*, and at all times of her life, enter on the land, and receive her jointure. They are to receive it quarterly. But on large eſtates, it is not the practice to reſerve rents quarterly. Taking it, that the rents are reſerved annually, or even half-yearly, that they are payable at *Lady-day*, and that after *Lady-day*, and before *Midſummer*, and before the rents are received, the jointreſs dies. On the ſtatute 11 *G.* 2. *c.* 19. *ſ.* 15., her executors could only recover at moſt the fractional ſum which has accrued ſince the quarter-day, but the prior arrears could never by any proceſs whatever be recovered. Theſe would not, perhaps, be reaſons ſufficient to induce the Court to change an eſtate clearly expreſſed; but the deed clearly and manifeſtly, *primâ facie*, creates a fee, and the only queſtion is, whether it is by implication to be reduced to an eſtate

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pur auter vie. Unlefs therefore this implication be made quite manifeft, and unlefs the conftruing it to be a fee, will be attended with much worfe effects than the other altenative, the Court will not refort for a folution to the eftate *pur auter vie.* There is this further difficulty in the conftruction contended for; here is alfo a power of charging for younger children, and if the truftees are to have no other eftate than during the life of the jointrefs, how are they, under that eftate, to raife the portions for daughters, and to leafe for twenty-one years abfolute? [*Mansfield* C. J. and *Lawrence* J. The powers of charging and leafing are not given to the truftees: they are neither empowered to leafe nor to charge; but the tenant for life is to exercife thofe powers *ad libitum.* It is argued on the other fide, that this could not be a fee in the truftees, becaufe during the eftate of the truftees the tenant for life cannot grant a legal leafe for twenty-one years, or make a legal charge.] That is only fhifting the difficulties; and perhaps if all thefe difficulties had been fuggefted to the teftator, he would have framed the limitations otherwife, and would have more fully confidered the particular way in which the power fhould be executed. It is of no detriment to the Defendant, though this fhould be held a void appointment; and indeed the teftator not having exactly pointed out how far the tenant for life fhall go, there is no meafure by which the Court can difcern the excefs, and therefore the appointment is bad *in toto.* It even deferves to be confidered whether this may not be a chattel intereft. The argument againft it, that the duration of no chattel intereft can be meafured by the life of man, is a *petitio principii*, for it affumes that, which the Defendant does not admit, that this eftate determines with the life of the jointrefs; though no cafe indeed has been cited, to prove that a chattel intereft may not be given determinable with human life. As

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to the cafes cited, in that of *Doe d. Hicks* v. *Compere*, it was evident that a fee was not intended to be given, becaufe the fame form of devife to truftees was repeated after the limitation of each eftate for life; but in the prefent cafe there is no fuch palpable and neceffary intendment by which the eftate muft be fo narrowed. *Venables* v. *Morris* may be confidered as an authority that the Court will, if poffible, conftrue fuch an eftate to pafs, as beft will execute the intention of him who makes it. In *Curtis* v. *Price*, it was manifeftly not the intention of the fettlor to give the truftees a fee, becaufe a term in the fame premifes is immediately after limited to them, to commence from the determination of the eftate fuppofed to be a fee: that cafe therefore is not applicable here. The Defendant does not much rely upon the cafe of *Doe d. White* v. *Simpfon*, becaufe the Court looked at it with a very different view, but it does feem that the Court would there have admitted that, which the Plaintiff argues is impoffible, the creation of a term for raifing the arrears after the determination of the life eftate. [*Mansfield* C. J. If you admit that, you admit that the Court would rightly hold this to be an eftate *pur auter vie*; becaufe you remove the objection raifed from the difficulty of levying the arrears after the life eftate; and it would not neceffarily follow that the original eftate might not be an eftate *pur auter vie*, although we were to hold that, after its determination, a new term would arife to complete the purpofes of the limitation.] A devife of lands to truftees and their furvivor, and the executors of the furvivor, which has often been held to create a fee, was yet, in *Doe d. Simpfon* v. *White*, held not to have that effect. [*Lawrence* J. The further truft, to raife 800*l*., it was held, might be fufficiently fatisfied by implying a term after the lives of the annuitants, and therefore there was no need to conftrue it a fee.] It is therefore not unreafonable

able to imply a chattel intereſt in this caſe, ſince it appears to be the moſt obvious way of ſatisfying the intention of the parties, to create a chattel intereſt; and it may be properly ſo conſidered, although the words import a fee. It is, however, indifferent to the Defendant to which of theſe two conſtructions the Court may incline. He ſays that the teſtator has given the tenants for life the power of diſplacing the ſucceeding legal eſtates, and converting them to equitable eſtates: but if this be conſidered as a void execution at law, it will diſplace no eſtates; and no injuſtice will be done by this conſtruction, for the ſettlements will ſtill operate as good charges in equity. A covenant to ſtand ſeiſed is a known form of conveyance, and may operate as an appointment, but it does not therefore follow that a covenant for quiet enjoyment ſhould have the ſame effect. [*Mansfield* C. J. The difficulty in *King* v. *Melling* was, that the covenant to ſtand ſeiſed was by a man who could not ſtand ſeiſed, becauſe he was a tenant for life, whoſe eſtate expired with his own life, nevertheleſs it was held a good execution.] The covenant for quiet enjoyment is only in ſuperabundance and in furtherance of his execution, but it did not go the whole length of the object; it could operate only for that which he covenanted for, the duration of his own eſtate. None of theſe expedients contended for by the Plaintiff would, therefore, have ſecured to the jointreſs the regular quarterly payment of the rent-charge, the eſtate *pur auter vie* would be attended with great inconvenience, and it would be better to hold that the truſtees took no eſtate at all than that.

Shepherd in reply. The Defendant ſeems to rely but feebly on the argument for a chattel intereſt. A leaſe or grant to any one generally, without ſaying more, is an leaſe for life: it may be reduced to a chattel by adding

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adding any thing which limits it to an event that must necessarily happen in a definite time. In *Doe* v. *Simpson*, Lord *Ellenborough* by no means held, that the estate, the trusts of which were to endure for the measure of human existence, was a chattel interest: on the contrary, he held that it was, as far as related to the annuitants, an estate *pur auter vie*; but to meet the objection that such an estate would not wholly satisfy the trusts of the will, because there was a solid sum to be raised, he held, that it might, as to that purpose, be considered, as if there had been no annuities at all, in which case it was clearly to be held a chattel interest for the raising of the solid sum: but the Court were quite clear it was not a fee for the purpose of raising the annuities for the annuitants. This execution is not void *in toto*: deeds which are completely bad as conveyances, will nevertheless operate well as appointments. Such was the case cited of the covenant to stand seised to uses. It is said that the settlor had the power to make a jointure given to him generally, and that by giving a fee he has executed it in the best possible way, but it may be denied that when a power is given to perform an act generally, and it may be done in either one of three or four methods, the appointor is at liberty to do it only in the best possible way; but if the best possible way were to be pursued, it could be executed only by giving an estate *pur auter vie*; because by that mode it may be effectuated without destroying any one of the legal remainders. In *Doe* v. *Simpson*, Lord *Ellenborough* C. J. says, (for much stress has been laid on the argument *ab inconvenienti*,) "if the inconvenience should subsist to a greater degree than it is likely to do, it would not warrant us in putting a construction on the will, in order to avoid it, which the terms of the will do not fairly and naturally in themselves bear." In the case of *Kenrick* v. *Lord William Beauclerk*, 3 *Bos. & Pull.* 175., Lord *Alvanley*

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Alvanley C. J. ſays, "It would indeed be much more convenient, that the legal eſtate ſhould be veſted in truſtees for the payment of the debts, than that the truſt ſhould be executed by the deviſees under the direction of a court of equity; for a court of equity could not enable a deviſee to make a complete title to this eſtate. But this is only an argument *ab inconvenienti*, from which we cannot conſtrue the teſtator to have ſaid that which in fact he has not ſaid." The obſervation that the teſtator ſeems to have contemplated that theſe eſtates were covered with incumbrances, and that truſtees could not inſtantaneouſly get into the pernancy of the rents and profits, wherefore an eſtate *pur auter vie* would be unſuitable to the purpoſe of ſecuring the annuity, goes to the length of ſuppoſing that nothing might ariſe during the whole life of the jointreſs, and that a ſale might be neceſſary, in order to ſecure payment to her executors of the whole ſum which accrued during her life; but this argument is rebutted by the circumſtance that the teſtator has deviſed ſpecific eſtates for the payment of his debts, and has deviſed over the reſidue, and that he directs the jointure to be raiſed out of the rents and profits only, ſo that he evidently contemplated, that the eſtate which he ſubjected to the jointuring power, would be unincumbered and ſufficient. It is argued that the teſtator, in creating an eſtate tail, intended that the tenant in tail ſhould be in a condition to cut off the entail as ſoon as poſſible: but this, ſurely, is not to be preſumed, but rather the contrary: and though the Court will do nothing to prolong an entail, they will lend no extraordinary aſſiſtance in order to cut it off. No caſe has been cited to ſhew that an eſtate given to truſtees and *their heirs*, coupled with *duties*, that conſiſt with a leſs eſtate, ſhall carry a fee. A deviſe to truſtees and their heirs in truſt to ſell, was held by Lord *Hardwicke* to confer a fee, becauſe a leſs eſtate would

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not anfwer the purpofe, but here no fuch neceffity exifts; and although, if the fettlement were now to be made, the Court of Chancery would direct it to be framed in the beft poffible way, yet when the appointment is actually made, and is legally good, the Court will not undo it, merely becaufe a better mode might poffibly have been fuggefted.

Cur. adv. vult.

On this day the Court fent to the Lord Chancellor the following certificate:

WE have confidered the circumftances of this cafe, and the arguments of counfel for the parties, and are of opinion that the truftees named in the deed of appointment of the 20th day of *June* 1766, and in the other deeds of the 26th of *December* 1782, and the 1ft of *December* 1796, did not, nor did any of them, take any eftate or intereft in the manors, lands, and hereditaments in queftion, of which the Right Honourable *Philip* Lord *Wenman*, the teftator, was feifed in fee-fimple at the time of making his will, and which were thereby given to the Honourable *Philip Wenman* his fon, afterwards *Philip* Lord *Wenman*, for life, or in any of them.

J. MANSFIELD.
J. HEATH.
S. LAWRENCE.
A. CHAMBRE.

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Nov. 28.

If the Defendant plead a subtle plea to ensnare the Plaintiff, the Court will permit the Plaintiff to sign judgment, unless the Defendant will amend.

THIS was an action upon a bail-bond. The Defendant pleaded, that the Plaintiffs sued out the writ upon which they had declared against him, before the assignment of the supposed writing obligatory was stamped according to the directions of the statute; and also before any cause of action in that suit had accrued to the Plaintiffs thereupon; which he averred, and prayed judgment, and that the Plaintiffs might be directed to cause the writ to be returned and filed of record, and that the record thereof, when returned, might be inspected by the Court.

Peckwell Serjt. had on a former day obtained a rule *nisi* to quash this plea, and that the Plaintiffs might be at liberty to enter up final judgment, as for want of a plea.

Onslow Serjt. shewed cause. Although there may be some surplusage, the plea is good. The statute 4 & 5 *Ann.* c. 16. requires that the assignment of the bail-bond shall be stamped before any action is brought thereon. This part then of the plea is of itself a good and substantive ground of defence, and the Defendant might have stopped here: but he goes on to say, "and before any cause of action in that suit had accrued to the Plaintiffs," which is another good defence: he then proceeds to pray that the Plaintiff may be directed to bring the writ into court; it is known the Court will not compel the production of the original writ, but this surplusage at the end will not vitiate the foregoing part of the plea, which is good. It suggests a plain replica-

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tion, that the aſſignment was ſtamped before the writ ſued out; and the Plaintiff might have proceeded to an iſſue upon that fact.

Peckwell in ſupport of his rule. The gentleman who penned this plea has laid a very ingenious trap. He knew the Court would not grant oyer of the original writ, and if we had demurred to the plea for want of oyer, he would have ſaid, there is a prayer of oyer at the end of the plea. The plea that the aſſignment was not ſtamped in due time, is a valid one, and well known, but the ordinary and proper form is, to plead that it was not ſtamped at the *commencement of the ſuit:* if he had ſo pleaded, the Plaintiffs could have taken iſſue on it with ſafety, but the Defendant refers to the time of ſuing out the writ on which the Plaintiffs declare. If the Plaintiffs had replied that the aſſignment was ſtamped before the commencement of the ſuit, the Defendant would have demurred for the departure; if the replication had been, that the aſſignment was ſtamped before the original writ was ſued out, it could not have been ſhewn until oyer of the original, which is never granted; if the Plaintiffs had replied that it was ſtamped before the *capias* was ſued out; the Defendant would have ſaid that that was merely meſne proceſs, and that it was an admiſſion that it was not ſtamped before the original ſued out. The writ on which the Plaintiffs declare, is not the writ which they ſue out; they ſue out a *capias ad reſpondendum* only, but declare upon an original. In all theſe caſes of new devices and experiments, the Court permits judgment to be ſigned for want of a plea.

The Court thought there might be ſome ambiguity in the words "ſued out the writ on which they have declared,"

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clared," but difcharged the rule, upon condition of the Defendant amending *inftantèr*, by altering it to the words "commenced this fuit," and ftriking out the prayer of oyer.

Rule difcharged without cofts.

REGULA GENERALIS.

IT is ordered, that from henceforth in bailable cafes for any fum exceeding one thoufand pounds, it fhall be fufficient for the bail to juftify in one thoufand pounds beyond the fum fworn to.

END OF MICHAELMAS TERM.

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A lady having actually married with the consent of guardians named by her deceased supposed putative father, and confirmed by the Court of Chancery, she suffered a recovery, and declared the uses to the joint appointment of herself and her husband, with remainder in strict settlement. It being discovered that her supposed marriage was void, because at the time thereof her legal father was alive, and did not consent to the marriage, the parties conceived that the settlement and recovery were void, and executed a deed of revocation, and suffered another recovery, after which the lady made a new settlement. Held that the recovery and first settlement were valid, although made under a mistake of the situation in which the parties stood.

THIS was a case directed by the Lord Chancellor for the opinion of the Court of Common Pleas. The case stated, that on the 26th of *January* 1794, Sir *Edward Boughton*, being seised in fee of an estate called *White Acre*, by his will devised the same to *Richard Sandilands* and *John Allen*, their heirs and assigns, "In trust "and to and for the uses after mentioned, that is to say,) "to the use of his daughter *Eliza Davis*, during her natural life; and after her decease, to the heirs of her "body lawfully to be begotten, in tail general;" provided "that his said daughter should marry with the consent of "her guardians, and that the husband she might happen to "marry should take upon him the name of *Boughton*; "and in case *Eliza Davis* should die without issue, then, "in trust for his daughters *Caroline Davis* and *Lucy* "*Davis*, successively, for life, and to the issue of their respective bodies lawfully to be begotten, successively in "tail general. And after the decease of all his daughters "without issue, in trust for the testator's own right heirs "for ever." And in the will were contained the following words: "I appoint my sister *Rutherford* and Mr. "*Sandilands* guardians of my said children." The testator died without legitimate issue; *Eliza*, *Caroline*, and *Lucy Davis*, named in the will, had gone by the name of *Boughton* in the testator's lifetime. They were reputed and believed to be the natural children of the testator. At the time of the birth of *Eliza*, her mother was lawfully married to a person of the name of *Kaye*, who was living at the death of the testator; and on the 10th of *August* 1798, on which day *Eliza* was married by licence

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to *George Charles Brathwaite* Efq., Mrs. *Rutherford* and Mr. *Sandilands*, who were named as guardians in the will, having been firft appointed guardians by the Court of Chancery, and having been parties affenting to the marriage. Previous to this marriage, articles, bearing date the 6th *Auguft* 1798, were entered into, by which Mr. *Brathwaite* covenanted, that upon the faid *Eliza Davis* coming of age, the faid eftate fhould be conveyed to certain ufes in the articles fpecified, and that he and his intended wife fhould join in recoveries for conveying the fame to fuch ufes; *thefe are entered into in confideration of the intended marriage*, and of the fettlement or provifion to be made by the intended hufband for the wife and her iffue. *Eliza* attained her age of 21 years on the 21*ft of March* 1799. An indenture of bargain and fale, bearing date the 1ft day of *May* 1799, was made and executed between *G. C. Brathwaite*, by the defcription of *G. C. Brathwaite Boughton*, of *Pofton*, in the county of *Hereford*, Efq., a lieutenant-colonel in His Majefty's army, (theretofore called *G. C. Brathwaite*,) and *Eliza Davis*, by the *defcription of* Eliza *his wife*, (one of the daughters, and a devifee, named in the laft will and teftament of Sir *Edward Boughton*, late of *Pofton Court*, in the county of *Hereford* aforefaid, Baronet, deceafed, of the firft part; *James Farrer* Efq. of the fecond part; and *Thomas Atkinfon*, Gentleman, of the third part: It recited the teftator Sir *E. Boughton*'s will, his death without revoking or altering it: the marriage with fuch confent as aforefaid; that *G. C. Brathwaite* had, by virtue of His Majefty's royal licence, affumed and ufed the name of *Boughton*;" that *Eliza* the wife, had attained the age of 21; that he and fhe, or he in her right, were in poffeffion; that he and his wife had agreed and determined to fuffer a common recovery, to the ufes therein after limited; and therefore in purfu-

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ance of that agreement, and for barring her eftate tail, and for affuring the premifes to the ufes thereinafter declared, and in confideration of ten fhillings to each of them paid by the faid *James Farrer*, they grant, bargain, and fell to him and his heirs, the premifes, to hold unto, and to the proper ufe and behoof of him, his heirs and affigns, during the joint natural lives of the hufband and wife, to the intent to make him a good tenant to the precipe, that a recovery might be fuffered, in which a writ of entry might be fued out againft *Farrer*, who was to appear and vouch to warranty *G. C. Brathwaite Boughton* and *Eliza* his wife, who were to vouch over the common vouchee, &c.; and the recovery was to enure to the ufe of fuch perfon or perfons, and for fuch eftate or eftates, and to, for, and upon fuch ufes, trufts, intents, and purpofes, and under and fubject to fuch charges, powers, provifions, and declarations as the faid *G. C. Brathwaite Boughton* and *Eliza* his wife, by any deed or deeds, &c. fhould jointly direct, limit, or appoint; and in default of and fubject to any fuch joint direction, limitation, or appointment, to the ufe of *G. C. Brathwaite Boughton* and his affigns for life, fans wafte; with remainder to the ufe of *Eliza* his wife, and her affigns for life, fans wafte; with remainder to the ufe of *Farrer* and his heirs, during the lives of *G. C. Brathwaite Boughton* and *Eliza* his wife, and the life of the furvivor of them, upon truft to preferve the contingent remainders; with remainder to the ufe of the firft and other fons of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her hufband, fucceffively in tail male; with remainder to the ufe of the firft and other daughters of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her hufband, fucceffively in tail male; with remainder to the ufe of the firft and other fons of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her hufband, fucceffively in tail

tail general; with remainder to the ufe of the firft and other daughters of *Eliza Boughton*, by *G. C. Brathwaite Boughton* her hufband, fucceffively in tail general; with remainder to the ufe of the firft and other fons of *Eliza Boughton*, by any hufband or hufbands with whom fhe might happen to intermarry after the deceafe of *G. C. Brathwaite Boughton*, fucceffively in tail male; with remainder to the ufe of the firft and other daughters of *Eliza Boughton*, by fuch after-taken hufband or hufbands, fucceffively in tail male; with remainder to the ufe of the firft and other fons of *Eliza Boughton*, by any after-taken hufband or hufbands, fucceffively in tail general; with remainder to the ufe of the firft and other daughters of *Eliza Boughton*, by any fuch after-taken hufband or hufbands, fucceffively in tail general; with remainder to the ufe of fuch perfon or perfons, and for fuch eftate or eftates, and to, for, and upon fuch ufes, trufts, intents, and purpofes, and under and fubject to fuch charges, powers, provifoes, and declarations, as *G. C. Brathwaite Boughton*, at any time or times during his life, by any deed or deeds, &c. fhould feparately or alone direct, limit, or appoint; and in default of fuch laft mentioned direction, limitation, or appointment, to the ufe of the right heirs of *G. C. Brathwaite Boughton* for ever. In *Eafter* term 1799, a recovery was duly fuffered purfuant to the faid deed. This indenture in every part of it defcribes *G. C. Brathwaite Boughton* and *Eliza*, as hufband and wife, but it is not expreffed to be made in execution of the articles before marriage, nor in confideration of the marriage; and in fact, the ufes are materially different from thofe to which the premifes were covenanted by the articles to be fettled; and it being taken for granted that the parties were married, there is no limitation of any ufe to her and her heirs until the marriage. After this indenture was executed, and the recovery fuffered

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suffered in pursuance thereof, it was discovered that when the articles of the 6th *August* 1798 were entered into, and when the marriage was supposed to be had, *Eliza* was, in law, the daughter of her mother and the man to whom her mother was married; and therefore that *Eliza*'s marriage with *G. C. Brathwaite Boughton* was not duly solemnized, and that they were not husband and wife; and upon the trial of an issue since directed by the Court of Chancery, this has been so found. In these circumstances, by a deed of four parts, dated the 27th of *June* 1800, and made between *Eliza Boughton*, by the description of *Eliza Boughton* otherwise *Eliza Kaye*, otherwise *Eliza Davis*, of *Poston Court* in the county of *Hereford*, spinster, and devisee in tail named in the last will and testament of Sir *Edward Boughton*, of the first part, *G. C. Brathwaite Boughton* of the second part, *James Farrer* of the third part, and *Thomas Atkinson* of the fourth part; reciting the will of Sir *Edward Boughton*, and the articles of the 6th *August* 1798, the bargain and sale of the 1st *May* 1799, and the recovery suffered in pursuance thereof; and reciting, that since the said several indentures were executed, and the said recovery suffered, it had been discovered that at the time of the date and execution of the intenture of 6th of *August* 1798, and at the time when the marriage between the said *G. C. Brathwaite Boughton* and *Eliza Boughton* was supposed to be solemnized, *Eliza* was a legitimate child of *John Kaye*, by his wife *Salome Kaye*, (in the testator's will called *Salome Davis*,) and that *John Kaye* and *Salome* his wife, (the lawful father and mother of *Eliza*,) were still both living, wherefore, inasmuch as *Eliza Boughton* was an infant under the age of 21 years, and incapable of contracting matrimony, or of making, or agreeing to make, any settlement or settlements of her estates or fortune when

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the before-mentioned indenture of the 6th of *August* 1798 was made and entered into, and when the marriage between *G. C. Brathwaite Boughton* and *Eliza Boughton* was agreed upon, and was meant and intended to be solemnized, and inasmuch as the same indenture of settlement was made and executed, and the said marriage was contracted and attempted to be solemnized, without the consent of *John Kaye*, the father and natural guardian of *Eliza Boughton*, it was considered and understood that the said supposed marriage between *G. C. Brathwaite Boughton* and *Eliza Boughton*, and also the articles of the 6th of *August* 1798, and the settlement of the 1st *May* 1799, and all other settlements and contracts or agreements for settlements whatsoever, made, entered into, or executed, in contemplation or consideration of such marriage, were absolutely null and void; and that *Eliza Boughton* and *G. C. Brathwaite Boughton* were then at full liberty, either to marry again, or to remain single and unmarried, as they might think proper; and that if *Eliza Boughton* and *G. C. Brathwaite Boughton* should determine to marry again, then that they were competent and at full liberty, either before or after such new marriage, to enter into and make such other articles or settlements, of or concerning their estates or fortunes, or to refuse or omit making any such articles or settlements, as they might think proper; and reciting that *Eliza Boughton* and *G. C. Brathwaite Boughton* were agreed, and had determined, not to marry again upon the terms, or under any of the conditions or engagements for making settlements, which were agreed upon, or were stipulated for, or made, or entered into, on the treaty aforesaid, or in contemplation of their supposed former marriage; and that, in order that if *Eliza Boughton* and *G. C. Brathwaite Boughton* should thereafter determine to marry again, there

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there might be no reafon or pretence to contend, infift, or fuppofe, that fuch fecond marriage was agreed upon, or had, or folemnized upon any fuch terms or under any fuch conditions or agreements for making fettlements as aforefaid, *G. C. Brathwaite Boughton* and *Eliza Boughton* had not only mutually and refpectively agreed to refcind, revoke, and declare abfolutely null and void, the faid two indentures of fettlement of the 6th *Auguft* 1798 and the 1ft *May* 1790, and all the covenants, contracts, agreements, ufes, trufts, limitations, provifoes, and declarations therein refpectively contained; but had alfo mutually and refpectively agreed to releafe, exonerate, and difcharge each other from all contracts, promifes, engagements and agreements whatfoever, either for marriage or for making any fettlement or fettlements upon, or in confideration of marriage, which had at any time or times theretofore been made or entered into between and by *G. C. Brathwaite Boughton* and *Eliza Boughton*, or by one of them with or to the other of them, or by one of them with or to any other perfon or perfons on behalf of the other of them; and of and from all breaches or forfeitures of fuch contracts, promifes, engagements, and agreements refpectively, and all actions, fuits, damages, claims, and demands on account thereof, or of any of them, refpectively, in fuch manner as was thereinafter mentioned and expreffed; and that *Eliza Boughton* had alfo agreed to releafe and difcharge *G. C. Brathwaite Boughton* from, and to ratify and confirm all payments that had been made by or to, and all acts, matters, and things that had been done by *G. C. Brathwaite Boughton* from, for, or on account of, or upon, about, or concerning the eftates devifed by the faid recited will, fince the marriage fo intended and attempted to be had and folemnized between them; and reciting, that for the purpofe of avoiding or obviating and removing all doubts

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and queftions that might arife refpecting the operation of the faid common recovery, or refpecting the fufficiency of fuch common recovery, to bar, extinguifh, and deftroy the eftate tail vefted in *Eliza Boughton*, under or by virtue of the fame will, with all remainders and reverfions thereupon expectant or depending; and for the purpofe of conveying the premifes to fuch ufes, upon fuch trufts, and for fuch intents and purpofes as were thereafter limited, *Eliza Boughton* had determined to fuffer a new common recovery of the premifes in the manner thereinafter mentioned; and that *Eliza Boughton* had requefted, *G. C. Brathwaite Boughton* to join with her in making a tenant to the precipe for fuch new common recovery, which he had agreed to do in fuch manner as thereinafter was expreffed; therefore, by the faid deed, *G. C. Brathwaite Boughton* and *Eliza* did feverally and refpectively refcind, revoke, and declare abfolutely null and void the faid feveral indentures of the 6th *Auguft* 1798 and the 1ft of *May* 1799, refpectively, and all the covenants, contracts, agreements, ufes, &c. in or by the fame indentures, or either of them, limited, declared, or contained; and alfo all other contracts, promifes, engagements, and agreements whatfoever, either for a marriage, or making any fettlement upon, or in confideration of marriage, which had at any time theretofore been made or entered into between them; and they and each of them did quit claim to the other of them, all contracts, promifes, engagements, and agreements whatfoever, either for marriage, or for making any fettlement or provifion upon, or in confideration of marriage, which at any time theretofore had been entered into by them, with or to the other of them, or by either of them, with or to any perfon or perfons whomfoever, on behalf of the other of them; and from all breaches or forfeitures that had been

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been or ſhould thereafter be made or committed of, in, or concerning the ſaid contracts, promiſes, engagements, and agreements, or any of them; and alſo of and from all actions, ſuits, &c. whatſoever, on account or in reſpect of ſuch contracts, &c.; and for the barring the eſtate tail which by or under the teſtator's will was veſted in *Eliza Boughton*, of and in the premiſes, and all remainders and reverſions upon the ſame eſtate tail expectant or depending, (in caſe the ſame had not already been well and effectually barred by the ſaid common recovery); and for conveying, limiting, and aſſuring the premiſes to the uſes, upon the truſts, and for the intents thereinafter limited, declared, or expreſſed, and alſo in conſideration of 10*s*. to each of them, *G. C. Brathwaite Boughton* and *Eliza Boughton*, paid by *Farrer*, the ſaid *G. C. Brathwaite Boughton*, at the requeſt and by the direction of *Eliza Boughton*, and according to ſuch eſtate or intereſt as he had in the premiſes, (if any ſuch he had,) and alſo the ſaid *Eliza Boughton*, did each of them grant, bargain, and ſell, direct, limit, appoint, and confirm unto *Farrer*, his heirs and aſſigns, the premiſes, and all their and each of their eſtate, to hold unto and to the uſe of *Farrer*, his heirs and aſſigns, for the life of *Eliza*, to the intent that a recovery might be ſuffered, in which the writ of entry was to be proſecuted againſt *Farrer*, who was to vouch *Eliza Boughton*, (not *G. C. Brathwaite Boughton*,) who was to vouch the common vouchee: and the uſes were declared to be to ſuch perſon or perſons, and for ſuch eſtate or intereſt, eſtates or intereſts, upon ſuch truſts, and to or for ſuch intents or purpoſes, and under and ſubject to ſuch powers, proviſoes, charges, conditions, and reſtrictions, and in ſuch manner and form as *Eliza Boughton*, (notwithſtanding any coverture ſhe might be under, and whether ſhe ſhould be covert or ſole,) at any time or times during

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her natural life, by any deed or writing either with or without power of revocation and new appointment, ſhould direct, limit, appoint, give, or deviſe the premiſes; and in default thereof, to the uſe of *Farrer* and his heirs during the life of *Eliza Boughton*, in truſt to permit her to hold and enjoy the ſame, and to receive and take the rents, iſſues, and profits thereof for her own uſe during her life, and to convey ſuch eſtate or intereſt to ſuch perſon or perſons, and at ſuch time or times, and in ſuch manner, as *Eliza Boughton*, notwithſtanding any coverture, and whether ſhe might be covert or ſole,) ſhould direct or appoint; and from and immediately after her deceaſe, then to the uſe of the right heirs of *Eliza Boughton* for ever. In *Trinity* term 1800, a recovery was duly ſuffered, purſuant to the laſt deed, wherein *Eliza Boughton* was vouched, and not *G. C. Brathwaite Boughton.*

By indentures of leaſe and releaſe, dated 2d and 3d *April* 1802, and made between *Eliza Boughton*, (by the ſame deſcription as in the laſt deed), of the firſt part, *G. C. Brathwaite Boughton* of the ſecond part, *James Farrer* of the third part, and *William Fulke Greville*, *Thomas Coutts*, and *Edmund Antrobus*, Eſqrs. of the fourth part, reciting the deed of the 27th *June* 1800, and that a recovery, (as the fact was,) had been ſuffered according to it; and that a marriage had been agreed upon, and was intended to be ſhortly had and ſolemnized between *G. C. Brathwaite Boughton* and *Eliza Boughton*; and that upon the treaty for the marriage, and in conſideration of the ſettlement or proviſion agreed to be made by *G. C. Brathwaite Boughton* upon and for *Eliza Boughton*, and the children or iſſue of the ſaid marriage, (if any ſuch there ſhould be,) in ſuch manner as mentioned in a certain indenture of three parts, bearing equal date there-

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therewith, it was ſtipulated and agreed, by and on the part of *Eliza Boughton*, that ſhe ſhould and would, previous to the ſolemnization of the then intended marriage, limit, appoint, ſettle, convey, and aſſure the premiſes to the ſeveral uſes, &c. thereinafter limited or expreſſed; and that *Farrer* had agreed to join with her in conveying the premiſes in ſuch manner as thereinafter expreſſed; therefore, in purſuance of that agreement, and in conſideration of the ſaid then intended marriage, and of the ſettlement or proviſion made or agreed to be made by *G. C. Brathwaite* upon or for *Eliza Boughton*, and the children or iſſue of the intended marriage, (if any ſuch there ſhould be,) as in the ſaid indenture bearing equal date therewith was mentioned, ſhe, the ſaid *Eliza Boughton* (in exerciſe of the power given or reſerved to her by the laſt-recited indenture, and with the privity and conſent of *G. C. Brathwaite Boughton*,) directs, limits, and appoints, that the premiſes ſhould go, remain, and be, and that the ſaid indenture, and the recovery ſuffered in purſuance thereof, and all other aſſurances, ſhould from thenceforth operate and enure to the uſes, &c. thereinafter limited. And for the conſiderations aforeſaid, and for the better and more effectually conveying, ſettling, and aſſuring the premiſes to the uſes, &c. thereinafter mentioned, and in conſideration of 10*s.* a-piece to *Eliza Boughton* and *James Farrer*, paid by *William Fulke Greville*, *Thomas Coutts*, and *Edmund Antrobus*, the ſaid *James Farrer* (according to his eſtate and intereſt in the premiſes, and at the requeſt and by the direction of *Eliza Boughton*, and with the privity and approbation of *G. C. Brathwaite Boughton*,) bargains, ſells, aliens, and releaſes; and *Eliza Boughton*, with the like privity, conſent, and approbation of *G. C. Brathwaite Boughton*, grants, bargains, ſells, aliens, releaſes,

leases, and confirms unto *Greville*, *Coutts*, and *Antrobus*, (being in their possession,) and their heirs, the premises, to hold unto them, their heirs and assigns for ever, to the uses, &c. thereinafter limited; (that is to say,) to the use of *Eliza Boughton* and her heirs, until the intended marriage; and from and after the solemnization thereof, then to the use of such person or persons, and for such estate or estates, and to, for, and upon such uses, &c. as *G. C. Brathwaite Boughton* and *Eliza Boughton* should by deed jointly appoint; and in default thereof, to the use of *G. C. Brathwaite Boughton* for life; remainder to the use of *Eliza Boughton* for life; remainder to the use of the said trustees and their heirs, during the lives of *G. C. Brathwaite Boughton* and *Eliza Boughton*, upon trust to support contingent remainders; remainder to the use of the first and other sons of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail male; remainder to the use of the first and other daughters of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail male; remainder to the use of the first and other sons of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail general; remainder to the use of the first and other daughters of *Eliza Boughton* by *G. C. Brathwaite Boughton*, successively in tail general; remainder to the use of the first and other sons of *Eliza Boughton*, by any after-taken husband, successively in tail male; remainder to the use of the first and other daughters of *Eliza Boughton*, by any such after-taken husband, successively in tail male; remainder to the use of the first and other sons of *Eliza Boughton* by any after-taken husband, successively in tail general; remainder to the use of the first and other daughters of *Eliza Boughton*, by any after-taken husband, successively in tail general; remainder to the use of such person or persons, and for such estate or interest, estates or interests, and to and for such intents and purposes, and under and subject to such powers and provisoes, charges,

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 conditions,

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conditions, and reſtrictions as *Eliza Boughton* (notwithſtanding coverture) ſhould by will, executed and atteſted as therein mentioned, limit, appoint, give, or deviſe the ſame premiſes; and in default thereof, to the uſe of the right heirs of *G. C. Brathwaite Boughton* for ever. *G. C. Brathwaite Boughton* does not convey by theſe deeds of the 2d and 3d of *April* 1802. A marriage was afterwards duly had and ſolemnized on the 24th of *June* 1802. There has ſince been born a daughter of the ſaid marriage, named *Frederica Emma Laura*, who is now living, and no other iſſue. *G. C. Brathwaite Boughton*, conceiving that the deed of 1ſt *May* 1799, and the recovery thereupon ſuffered, were not void in law, has, in the form preſcribed by that deed, limited and appointed to *A. B.* and his heirs, the premiſes, upon the determination of the former eſtates, by that deed and recovery ſuppoſed to be created: and *Eliza Boughton*, conceiving that deed and recovery to be void in law, has according to the form preſcribed by the deed of the 3d of *April* 1802, limited (ſubject to the prior eſtates thereby ſuppoſed to be created) the premiſes to *C. D.* and his heirs.

The queſtions therefore referred for the opinion of the Court of Common Pleas, are;

1. Does *Frederica Emma Laura*, the daughter of the ſaid marriage, take any and what eſtate in the premiſes by virtue of the deed and recovery of 1799? or is the propoſition recited in the deed of the 27th of *June* 1800, true in the law, that the deed of 1ſt of *May* 1799, was abſolutely null and void?

2. Does *Frederica Emma Laura*, the daughter of the ſaid marriage, take any and what eſtate in the premiſes by virtue of the deed of the 27th of *June* 1800, the recovery ſuffered according thereto, and the deeds of 1802, or any, and which of them?

3. Is

3. Is *A. B.*, the appointee of *G. G. Brathwaite Boughton*, entitled to any and what estate in the premises?

4. Is *C. D.*, the appointee of *Eliza Boughton*, entitled to any and what estate in the premises?

This case was thrice argued: the first time in *Easter* term 1809, by *Lens* Serjt. for the Plaintiffs, (who were said to be *Geo. C. Brathwaite Boughton*, now Sir *Geo. C. B. Boughton*, *Eliza*, now Lady *Boughton*, *Frederica Emma Laura*, her daughter,) and *C. D.*, her appointee, mentioned in the fourth query; and by *Best* Serjt. for the Defendants (*a*), who were said to be the trustees under the will of Sir *Edward Boughton*, and who had filed their bill, praying to have the deed of 1799 delivered up to be cancelled; the second time in *Trinity* term 1809, by *Shepherd* Serjt. for the Plaintiffs, and *Williams* Serjt. for the Defendants; and again, the third time, in *Hilary* term 1810, by *Lens* for the Plaintiffs, and *Williams* for the Defendants.

The first and second arguments were in substance as follow. For the Plaintiffs. The principal question is, what was the effect of the deed of 1st *May* 1799, and the accompanying recovery, for the articles of the 6th of *August*, being purely equitable, do not affect the legal estate. As to this deed and recovery, two propositions are asserted by the Plaintiffs; first, that the deed and recovery, considered as one assurance, are both void together; secondly, that the deed is void even if the recovery stands good. If the deed be void, and the recovery good, then there being no declaration of the uses of the recovery, the uses shall result to Lady *Boughton*,

(*a*) Both the counsel for the Defendants declared, in the course of each of their several arguments, that they did not know who the persons were in whose behalf they were to contend, nor what were their interests; and that they abstained from pressing some points, lest they should injure their clients' interests without knowing it.

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the person suffering the recovery, in fee. 2 *Ro. Ab.* 789, *line* 45. *pl.* 1., and again, *ibid.*, *line* 50. *pl.* 2. "If two join in a common recovery, where one, (as here the supposed husband,) hath nothing in the land, and no use is limited thereon, this shall be to the use of him solely who had the interest in the land, and no use shall arise to the stranger." But if it be a necessary consequence that the deed of 1st *May* 1799 cannot be good for the purpose of making a tenant to the *precipe*, and bad for the further uses, and that the recovery and the deed must fall together, then the Plaintiffs contend that the recovery is void also. For where the whole foundation of a deed fails, there the deed itself is void; and the recitals all shew that this deed is made upon the very foundation of a marriage previously had, which marriage did not in truth exist: therefore none of the terms contained in that deed can have any effect or legal operation. The deed recites that *Geo. Boughton* and *his wife* had agreed to suffer a common recovery: if she was not his wife, then there was no agreement; it was not agreed between him and *Eliza Boughton*, a feme sole; the parties are described as *husband* and *wife*, the uses are declared to be, to such person as he, and *Eliza Boughton his wife*, should appoint: if he was not her husband he had no such power; still less in that case was there any foundation for the uses to the supposed husband for life, remainder to *his wife Eliza* for life, and to her first and other sons, and first and other daughters, by *G. Boughton*, *her husband*, in tail. It is unnecessary to discuss whether the parties could, if they had pleased, have framed a settlement containing a provision for illegitimate children to be thereafter born of them; they never had it in contemplation to make any such provision, nor do the words of this settlement create any such; for the first and other sons and daughters, can, in law, designate only legitimate offspring. The uses in this deed depend upon

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an implied condition precedent in law, although it is not in form a condition: it is aſſumed that a legal marriage had taken place: if there were not that, it was not in the contemplation of the parties to make any change in her eſtate at all; the marriage therefore failing, the uſes are void. 3 *Co. Dig.* 78 *Condition B.* 1. A condition precedent is ſuch as ought to be performed before the eſtate veſts, or the grant or gift takes effect. There was no intent in *Eliza Boughton* to transfer this eſtate, otherwiſe than on the ſuppoſition that the uſes which ſhe propoſed were to take effect. *Co. Litt.* 201. *a. Littleton* ſubdivideth conditions in deed into conditions precedent, (of the which it is ſaid, *conditio adimpleri debet priuſquam ſequatur effectus,*) and conditions ſubſequent. *Litt.* 378. Such condition as is intended by the law to be annexed to any thing, is as ſtrong as if the condition were put in writing. [*Mansfield* C. J. Suppoſe, inſtead of the circumſtances which have happened, the lady had, after making the deed, diſcovered that her huſband had been previouſly married to another woman: would not that have avoided the deed?] No caſe is extant exactly ſimilar, but in ſeveral caſes where marriage has been the foundation of the deed, the foundation failing, the deed has had no effect. 2 *Ro. Ab.* 792., *line* 47. *pl.* 3. If *A*, being ſeiſed of land, in conſideration of a marriage to be had between him and *B*, covenants to ſtand ſeiſed to the uſe of himſelf and *B*. for life, this is a contingent uſe, ſo that if the marriage do not take effect, the uſe ſhall not ariſe to *B*. *Ibid. pl.* 4. If *A* being ſeiſed of land, in conſideration of a marriage to be had between *B*, his ſon, and *C*, a woman, who are *infrà annos nubiles*, covenants to ſtand ſeiſed to the uſe of *B* and *C*, and then the marriage is had, and then they are divorced, the uſe limited to the wife ſhall ceaſe. *Dyer* 13. *a. pl.* 61. A man gave certain goods with his daughter in marriage, and afterwards they were divorced: the queſtion was, whether the woman

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ſhould have her goods back again. And by *Fitzherbert* and *Bauldwine* Js., it ſeems reaſonable that ſhe ſhall have them, inaſmuch as the cauſe and conſideration of the gift is then defeated; for the goods were given in advancement of her marriage, and *ceſſante cauſâ*, &c. And the book cites 19 *E.* 3., that if land be given in frankmarriage, and afterwards the donees are divorced, the one by whom the cauſe of divorce was firſt moved, ſhall loſe the land. As if the woman ſues it, the huſband ſhall have the land, and *e contrà*. But *Fitzherbert* ſaid, that there was another report of that caſe, which ſaid that the land ſhould be divided between them. And note, that about the 26th year of *H.* 8., upon evipence given in a writ of detinue, the Court was of opinion, "that if a woman had goods, and afterwards the huſband and ſhe were divorced, ſhe ſhould have again all the goods which were not ſpent." [*Heath* J. So it was always, if a woman enfeoffed a man *cauſâ matrimonii prælocuti*, and the marriage did not take place, ſhe ſhould have her lands again; which comes nearer to this caſe.] *Lib. Aſſ.* 19 *Edw.* 3. *fol.* 60. *pl.* 2. Novel Diſſeiſin between a woman plaintiff and a man defendant, before *Shard* and *Stof.* It was found by verdict that the father of the Plaintiff gave to the defendant the lands in frankmarriage, when they were *infra annos nubiles*, both the one and the other; and that afterwards, at their full age, the man was divorced, and that, with the good will of the woman; and that the divorce was made at the ſuit of the huſband, and after the divorce he kept poſſeſſion of the entirety, and ouſted the woman, whereupon ſhe brought aſſiſe; and becauſe ſhe was the cauſe of the gift, and the frankmarriage was terminated by the divorce at the ſuit of the huſband, it was agreed that ſhe ſhould recover the entirety. *P.* 19. *E.* 3. *Aſſizes* 83. *Co. Litt.* 204. *a.* And yet ſometimes in caſe of lands or tenements, *cauſâ* ſhall make a condition. As if a man

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give land to a man and his heirs, *causâ matrimonii prælocuti*, in this case if she marry the man, (for (*a*) so it is printed in all the editions, but the sense seems to require that it should be "if she either refuse to marry the man,") or the man refuse to marry her, she shall have the land again to her and to her heirs. Whether it be the case of a divorce, or of a marriage void *ab initio*, so that the foundation fails, *causâ*, it can make no difference; and the deed of 1799 was therefore void, and *Frederica Emma Laura* takes no estate under it. Before the deed of 1800 was executed, Lady *Boughton*, therefore, had the uses to herself in fee, and Sir *Geo. Boughton* did not take even a life estate under the recovery and deed of 1799. It remains to consider the effect of the subsequent deeds and recovery. It is immaterial to the Plaintiffs whether the deed of 1799 was wholly void, so that there was no good tenant to the precipe, and so the recovery bad, or whether the uses declared were alone void: for if the deed of 1799 being wholly void, the first recovery was bad, Lady *Boughton* continued tenant in tail, until the entail was well barred by the second recovery: if the first recovery was good, Lady *Boughton* was tenant in fee when she executed the deed of 1800, and suffered the second recovery: but a recovery suffered by a tenant in fee does not in anywise impair or weaken that estate, and the deed of 1800 gives her as ample a power of disposition over the estate as can be created. If, however, the uses of the deed of 1799 were not void, it might be thought that the deed of 1800 was an appointment made by Lady *Boughton* and Sir *George Boughton*, in pursuance of the power contained in the first settlement; but it is impossible to sustain that proposition, because the parties evidently never intended it as an appointment; on the contrary, they set out in the beginning of the deed of 1800, with de-

(*a*) Upon referring to the text it seems probable that the learned commentator wrote it as it is printed.

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claring that the deed of 1799 was void already, but in cafe it were not, they do all they can to refcind it; we cannot therefore argue that they meant to act under it. But thefe two perfons together were evidently able, either jointly, or both, or one of them, feparately, to difpofe of the whole eftate as they did; and whether the eftate moved from the one or from the other, the effect is the fame. The deed of 1802 is no more than an ordinary fettlement made previous to marriage. No joint appointment has been made under the power thereby created, the life eftates to the hufband and wife take effect: there are no fons of the marriage, but there is a daughter *Frederica Emma Laura*, who takes the eftate tail thereby created. There have been feparate appointments made by Sir *Geo. Boughton* and by Lady *Boughton*, by both under a mifconception, and, fuppofing that the deed of 1799 is void, their appointees take no eftate thereby. If, however, the deed of 1799 is good, *Frederica Emma Laura* takes an eftate tail under it; for not being born until after the marriage, fhe comes under the legal defcription contained in that deed, of a daughter of *Eliza Boughton* by *G. C. Brathwaite Boughton* her hufband.

For the Defendant. The deed of 1799, which led the ufes, and the recovery, form together but one affurance, and muft ftand or fall together; and as the recovery is clearly good, it will alfo uphold the ufes declared by that deed. There is no diftinction between faying that the foundation of the deed fails, and that there is no confideration for the deed; for fuppofing that the deed were made on a miftaken confideration, it was at moft but as if made upon no confideration; and it is clear that the want of confideration does not avoid a deed. It never was yet heard of, that a recovery was void becaufe the foundation of it failed. In a cafe where a fine is levied or recovery fuffered, the eftate paffes, although there be no confideration, or the confi-

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deration never takes effect or be illegal. Before the statute of uses, a court of equity would not enforce a contract which raised an use, without a consideration, as upon a covenant to stand seised, or the like; but since that statute, "in cases where uses pass by way of transmutation of possession, as by fine, feoffment, or recovery, there the consideration is not at all material; for he that doth make the estate, may appoint the use to whom he will, without any respect to marriage, kindred, money, or any other thing: for in this case his own will and consideration guideth the use and equity of the estate: yet in bargains and sales, and covenants to stand seised to uses, it is otherwise; for there, consideration is so necessary, that nothing will pass, neither will any use rise, without a consideration." *Sheph. Touchst.* 510, 511, 2 *Ro. Abr.* 791. *line* 10. *pl.* 1. If a man levy a fine, and covenant by indenture, in consideration of blood, and of the marriage of his bastard daughter, that the conusee shall stand seised to the use of his daughter, although this is not a good consideration to raise an use by way of covenant, yet it is sufficient upon a fine: for the will of the party is sufficient for that, without consideration. *Pl.* 2. *ibid.* If *A.* in consideration of 100*l.* paid by *B.* makes a feoffment in fee to *B.*, and *C.* the son of *B.*, that shall raise an use to *C.* well enough, although all the consideration was given by *B.* So *Owen*, 41. *Stevens* v. *Layton*. Mutual covenants that *T.* the son of the one party, and *M.* the daughter of the other, should marry; *pro quo quidem maritagio sic postea habendo; A.* covenanted to make an estate to *T.* and *M.*, and to the heirs of their bodies for the jointure of *M.*, and a fine was levied between *T.* and *M.* and the covenantors, to the uses of that deed. *T.* died, and *M.* intermarried with *L. Gawdy* Serjt. moved that the uses should be to the conusor. *Walmsley*. It is not like the case of a covenant to stand seised, which depends on the consideration; to which all the Court agreed. Here the purpose was most

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most expreſs, *ſic poſtea habendo*; yet upon that ſound diſtinction between tortious and rightful conveyances, the deed was not void, but the uſes took effect. *Jones* v. *Boyleſon*, *W. Jon.* 345. *Humphrey Hill* covenanted by indenture, in conſideration of the love that he had to *William Hill*, and that he was of his ſurname and conſanguinity, and for the preſervation and continuance of the eſtate in the name of the *Hills*, and in conſideration of a marriage to be had between *Richard Hill*, the ſon of the ſaid *William Hill*, and *Urſula*, the daughter of *J. S.*: and the covenant was, to aſſure his lands to *Humphrey Hill* for life, with remainder to the ſaid *Richard* and *Urſula*, and the heirs of the body of *Richard*; remainder to the uſe of *William Hill* in tail, with remainder over: a feoffment and fine were made and levied to theſe uſes: *Urſula* married another man, and *Richard* another wife: *Humphrey Hill* died, and the queſtion was, what eſtate *Urſula* had; and it was reſolved by the Court, and ſo adjudged, that the ſaid *Richard* and *Urſula* were joint-tenants, notwithſtanding that the marriage took not effect, by moieties, and not by entireties. The difference is, that if the conveyance had been by covenant in conſideration of marriage, there, if the marriage had not taken effect, the woman ſhould have nothing; but ſince a feoffment and fine were made and levied to that uſe, it is otherwiſe. *S. P. S. C.* 2 *Ro. Abr.* 792. *S. pl.* 2. *Page* v. *Hayward*, 1 *Salk.* 570. *S. C. Pigott on Rec.* 177. A ſtranger to the eſtate joined in making a tenant to the precipe, and was vouched jointly; and it was held that ſuch miſtake in the intention and ſituation of the parties did not vacate the recovery. Much of what was there ſaid, is applicable to this caſe. *S. P. Doe d. Greaſley* v. *Nelſon*, *ante*, 2. 59. Where a ſtranger joins in a conveyance, it ſhall be held the confirmation of the ſtranger; ſo that if the other ſhould die, it would be the grant of the ſtranger by eſtoppel. *Co. Litt.* 147. *b.* *A.* doth bargain and ſell

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land to *B.* by indenture; and before inrolment, they both grant a rent-charge by deed to *C*, and after, the indenture is inrolled: the grant is good, and after the inrolment, by the operation of the ſtatute 27 *H.* 8. *c.* 16., it ſhall be the grant of *B.*, and the confirmation of *A.* But if the deed had not been inrolled, it had been the grant of *A.*, and the confirmation of *B.*; and ſo, *quâcunque viâ dati*, the grant is good. *Doe ex dem. Luſhington* v. *Biſhop of Llandaff and Others*, 2 *New Rep.* 491. [*Mansfield* C. J. That caſe has merely decided that a man who was tenant in fee having ſuffered a recovery, is eſtopped from ſaying that there was no tenant to the *precipe*, and that therefore his deviſee is alſo eſtopped.] It makes no difference that the deed deſcribes Lady *Boughton* by an improper deſcription, as wife: that will not vitiate her grant. *Perkins*, *Grant*, *pl.* 40. " If *Alice at Style*, reciting by her deed that ſhe is a feme covert, and in truth ſhe is a feme ſole, grant annuity, it is a good grant, for that is but a void recital." In the caſe of frankmarriage, the entail is not to him and the heirs of his body, but to them and the heirs of their bodies; *Litt.* *ſ.* 17.: and the eſtate cannot be if the union does not take effect. This is wholly diſſimilar to the caſe of goods or lands given *cauſâ matrimonii prælocuti* before the ſtatute of uſes. All the Plaintiff's arguments are drawn from the practice of a court of equity, and are not admiſſible here. Equity may look at the ſuppoſed marriage as the conſideration of this deed, but at law the marriage is not the conſideration; the deed is made in conſideration of five ſhillings, and to the intent to make a tenant to the precipe for ſuffering a common recovery: and that conſideration, the only one to which this Court can attend, neither fails, nor is miſtaken. This is nothing like the caſe of a condition precedent: a condition precedent does not conſiſt in facts not known to the parties at the time, and which being afterwards diſcovered, render the grant void. On the contrary,

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trary, it is a thing known, and either implied in law, or expreffed, upon which being done, the eftate vefts. A condition implied differs in this refpect only from a condition expreffed, that the law makes the condition refulting out of the contract of the party. It has been objected that the ufes limited to the children of Lady *Boughton* by Sir *George Boughton*, her hufband, were too remote at the time of making the firft fettlement; but thefe fpringing ufes and contingent ufes arife every day, fince the ftatute of ufes. There are many common law cafes before that ftatute, in which it has been held that fuch ufes were bad. But though it is clear that the ufes to the iffue could not take effect unlefs the parents became hufband and wife, yet it was by no means impoffible for them to become fuch, and to have iffue of the marriage, and the very cafe has happened. *King* v. *Melling*, 1 *Vent.* 228. "It cannot be denied but that a devife to a man and the heirs of his body by a fecond wife, makes an eftate tail executed, though the devifee had a wife at the time, as the cafe often cited; land given to a married man and a married woman, and the heirs of their bodies:" 18 *Vin. Abr.* 395. *Remainder*, (G) *pl.* 19.: for the feme of the married man, and the baron of the married woman may die, and then the furvivors may intermarry and have iffue; and that is a much more remote contingency than in the prefent cafe. But fuppofing thofe ufes were too remote, ftill that would not avoid the whole deed. It is a principle coeval with the law itfelf, that a deed may be good in part and bad in part; as Ld. *Kenyon* C. J. admitted in the cafe of *Eftwick* v. *Cailland*, 5 *T. R.* 420., although he held that the doctrine was not applicable to that cafe. *Norton* v. *Simmes*, *Hob.* 14. The common law doth divide according to common reafon, and having made that void that is againft law, lets the reft ftand. *Collins* v. *Blantern*, 2 *Wilf.* 351. *acc.* *Ofgoode* v. *Strode*, 2 *P. Wms.* 245., *and Furfaker* v. *Robinfon*, *Prec. in Chan.* 475.,

475.) was there cited. Part of the deed was held bad, and part good. [*Mansfield* C. J. Surely it will not be contended with you at this day, that a deed may not be good in part and bad in part, unlefs that which is bad, being void, by neceffary implication makes the whole void.] The limitations of the deed of 1799 being therefore good, the deed of 1800 is of no ufe or effect: for what was it? Sir *G. Boughton* being feifed for life, with remainder to Lady *Boughton* for life, he, according to fuch eftate or intereft as he had in the premifes, and fhe alfo, granted to *Farrer*, during the life of *Eliza*: this therefore enured as a grant by Sir *G. Boughton* and a confirmation by Lady *Boughton* to *Farrer* and his heirs during the life of Lady *Boughton*, which was a lefs durable eftate than he had before, fo that the eftate would devolve to the heirs of *Farrer* upon the deceafe of *Eliza* as fpecial occupants: the ufes were declared to enure to fuch perfons as *Eliza* fhould appoint. It is not clear that Sir *G. Boughton* could grant fuch an eftate, but if he could, it could only be to fuch ufes as could arife during the life of Lady *Boughton*; fo that the ufes limited by the deeds of 1800 and 1802 could be of effect only for the life of Lady *Boughton*; confequently thofe deeds are not applicable any further than they are confiftent with the firft deed. It is faid the deed of 1800 might operate as an appointment under the deed of 1799. Sir *G. Boughton* and Lady *Boughton* certainly might, after the deed of 1799, have executed their power of joint appointment, and thereby have deftroyed the contingent eftates tail to the iffue of their future marriage, if any fuch fhould be born; but in order to do that, they muft have acted under and recognized their former deed: whereas it is evident from the recitals of the deed of 1800, they do not mean to affirm that which had been done, and to declare new ufes under it, they come to refcind and deftroy. The deed of 1799 made a good tenant to the precipe, and the recovery fuffered is good. It

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It is ſaid, and it is clear law, *Abbott* v. *Burton*, 1 *Salk:* 591., that if no uſes of the recovery are declared, the recovery ſhall follow the legal eſtate at common law, and enure to the uſe of the perſon by whom it is ſuffered in fee; but it is ſettled that where any uſes of a recovery are declared, no other uſes ſhall ariſe by implication. *Tipping* v. *Cozens*, 1 *Ld. Raym.* 35. That recovery therefore enured to the uſes of their joint appointment, and until that ſhould be executed they took veſted eſtates to Sir *G. Boughton* for life, remainder to Lady *Boughton* for life, remainder to *Farrer* to ſupport contingent remainders, with remainder to the ſons and daughters ſucceſſively in tail, &c. with a power of appointment in default of iſſue to Sir *George Boughton*, over the fee, in caſe of his ſurvivorſhip, and the ultimate remainder to him in fee. But the joint appointment not having been executed, it muſt be admitted that *Frederica Emma Laura* takes the eſtate tail under that firſt deed, and the appointee of Sir *George Boughton*, in whoſe favour the ultimate appointment has been exerciſed, alſo takes an eſtate in fee expectant on the determination of her eſtate tail. Neither *Frederica Emma Laura* therefore, nor *C. D*, the appointee of Lady *Boughton*, takes any eſtate under the ſecond ſettlement.

In reply it was obſerved, that the Lord Chancellor ſeemed to attach weight to the circumſtance, that the deed of 1800 conveyed to the tenant to the precipe an eſtate during the life of Lady *Boughton* only: but that eſtate was equally ſufficient to make a tenant to the precipe as an eſtate in fee would be. It is admitted by the Plaintiffs, that the firſt recovery was not void: but that does not therefore follow, which is urged upon the ground that the recovery and deed to lead the uſes are one aſſurance, as to ſome purpoſes they are, that the recovery, being good, upholds the ulterior uſes declared by the deed. [*Mansfield* C. J. There can be no doubt but that a recovery may be very good, and the

uſes declared may be bad: ſuppoſe a good tenant made to the precipe, and the tenant in tail ſuffers a recovery, and then by deed declares ſuperſtitious uſes, or any other uſes void in law; it would nevertheleſs be a good recovery to bar the eſtate tail: ſo if he declares uſes conſtituting contingent eſtates more diſtant than the law will allow, the recovery may nevertheleſs be good. Nothing in the miſ-deſcription of the perſons, calling themſelves huſband and wife, will vitiate the recovery.] Theſe uſes do depend, (which has been denied,) upon the parties being huſband and wife. The Plaintiffs do not put it on the ground of a conveyance executed by miſtake: there the Court of Chancery would compel the parties to do that which ought to be done: but here was a marriage in fact, though not in law, and the Court of Chancery would not have compelled theſe perſons to become huſband and wife. In the caſe of *King* v. *Melling*, the uſes were not impoſſible, although they were likely not to ariſe ſo ſoon as is ordinary in marriage ſettlements. In this caſe, as things then ſtood, the uſes were become impoſſible: there never could be a legal ſon or daughter of the marriage *theretofore had*, and the Defendant has not been hardy enough to contend that the uſes extended to all iſſue legitimate or illegitimate of thoſe two perſons. It is ſaid the facts muſt be known upon which a condition depends: here all the facts were known to the parties: they were ignorant only of the legal effect of them, and *ignorantia juris neminem excuſat*: and ſince the thing done proves not to be the ſame thing, nor to have the ſame legal effect, which was intended, the want of that intended act prevents the eſtate from taking effect. [*Mansfield* C. J. agreed that *King* v. *Melling* was not applicable, but ſaid this was not a miſtake in law, but a miſtake of fact; for it was not known that the mother had a huſband living.] The caſe of *Doe ex dem. Luſhington* v. *Biſhop of Llandaff* is not applicable: that was a mere caſe of miſnomer. Neither

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ther is this a cafe of eftoppel. The only material arguments that have been ufed, are thofe which tend to eftablifh the goodnefs of the firft recovery, from which it will follow that *Frederica Emma Laura* takes an eftate tail under one of the fettlements, and as the Plaintiffs contend, under that of 1802. The diftinction between ufes which take effect by tranfmutation of poffeffion and thofe which do not, has, in the Defendant's argument, been pufhed too far; for fuppofe a man already married to enter into fuch a deed as the firft fettlement, it would follow that (fetting the confideration of fraud out of the cafe) fo far as refpected the ftatute of ufes, that deed would be good. The deed however would in that cafe clearly be void; and void, not in refpect of any previous criminal act, for the firft marriage would have been lawful, but on account of the previous indiffoluble contract creating a difability. Here it is void on account of the difability of nonage. It is not contended for the Plaintiffs that the nullity of the firft marriage makes void the ufe limited to *Frederica Emma Laura* in tail, but that that ufe never arifes; and that the marriage never having taken effect, thofe ufes of the deed which depend on the marriage, namely, the life eftates to the hufband and wife, are void. [*Mansfield* C. J. The cafes cited for the Defendant are very ftrong to put the operation of a fine or recovery upon the will of the parties; and to guard againft that it is, that all fettlements are made to give the ufe to the fettlor until the marriage: if that intermediate ufe were not limited, the fettlee might aliene before the marriage. No argument has been raifed from the cafes of contracts for the fale of goods, for building houfes, or the like. Such contracts, whether under feal or not under feal, if they proceed on a clear miftake on both fides, are void. Suppofe a man and woman covenant to marry, both being married, but both underftanding their hufband and wife to be dead: would not that covenant

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be void? And here, if, inſtead of a conveyance having been actually made, the contract had ſtill reſted in covenant, Sir *G. Boughton* would never have had the eſtate: ſo that it all reſts upon the difference between a covenant and an actual legal conveyance. *Heath* J. Upon a leaſe, where the leſſor has covenanted that the leſſee ſhall enjoy during the term, and the leſſor had no power to leaſe, ſo that no term exiſts, the covenant is gone. *Lawrence* J. Suppoſe a relation of the parties had, without any valuable conſideration, but merely on account of his friendſhip for them, made a feoffment, in contemplation of the marriage had, to the huſband for life, with remainder to the wife for life, remainder to the children of the marriage: would that feoffment prove void, and carry nothing if it turned out that they were not legally married?] The deed would be void, if it purported to convey to them by that deſcription, for it would be the very caſe of frank-marriage, *Litt. ſ.* 17.

Cur. adv. vult.

In *Michaelmas* term 1809, the Court obſerved that there was one point which had not been diſcuſſed in the foregoing arguments, viz. Conſidering the firſt deed as good, what would be the effect of *Farrer*, the truſtee to ſupport the contingent remainder to the daughters in tail, joining in making the tenant to the precipe for ſuffering the ſecond recovery? Suppoſing that the contingent remainder could not otherwiſe be ſupported, would not that deed and recovery have the effect of deſtroying his eſtate, before any of the contingent eſtates came into *eſſe?* He was a mere tenant for life: whether for his own life, or that of another, differs not. By ſuffering a recovery, he diſavows the title of his leſſor for life, and incurs a forfeiture. The conſequence would be, the letting in any of the ſubſequent uſes of the firſt ſettlement; it might let in the power of the huſband to appoint in fee. Does it not therefore

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destroy the particular estate, out of which all the subsequent uses in that deed were to spring? If the only question were, whether the first deed were void, the Court was now prepared easily to answer that question. Supposing there had been no subsequent recitals, deeds, recoveries, or transactions, what is the objection to that deed? The limitation is, to a man and woman, who call themselves husband and wife, and to their sons and daughters. That can only mean legitimate sons and daughters. Although the parties call themselves husband and wife, when they are not, they marry afterwards; and why are not the limitations to the sons and daughters of that marriage good? Some of the Plaintiffs have in certain respects conflicting interests; and as the Court of Chancery has sent hither two questions on the effect of the appointments, it is fit they should be argued on behalf of the several persons who have the conflicting interests; and it will be unnecessary to discuss the effect of the first recovery; but, assuming the first recovery to be good, consider what effect the second recovery will have, so far as regards the appointments by the husband and wife.

Upon the third argument, in *Hilary* term 1810, *Lens* appeared for Lady *Boughton*, *Frederica Emma Laura*, her daughter, and for *C. D.*, her appointee, mentioned in the fourth question. He contended now, that the deed of 1800, which was, he said, executed in presence of two witnesses, took effect as a good joint appointment by Sir *G. Boughton* and *Eliza*, under the first power limited to them in the deed of 1799. He said he had been compelled to abandon this proposition before, so long as he argued that the deed of 1799 was void, but now, since that deed was held to be good, he was at liberty to argue that although in the recitals the parties considered that deed as void, and did not intend to act under it, yet that the Court must consider what they actually did, not what they intended to do. The object of the deed of 1800

was

was to destroy the supposed estate tail of Lady *Boughton*, proceeding on the supposition that the former deed and recovery had not that effect. Sir *Geo.* and Lady *Boughton* jointly appoint to *Farrer* to make him tenant to the precipe; and the first use declared of the recovery, is to the sole appointment of Lady *Boughton*. Although they had no reference to the power, and no conception of its continuance, yet the first deed being effectual in spite of them, it shall be effectual for all purposes that could afterwards affect the property, and good for this purpose as well as for others, *ut res magis valeat quam pereat*, for otherwise the deed of 1800 will not operate at all, but the whole will be left in the same state as it was after the execution of the deed of 1799. [*Mansfield* C. J. Is there any case where a deed has been held to be an execution of a power, unless it could be presumed, that the parties might have meant it in execution of their power?] If it cannot operate in this way, yet, Sir *Geo.* and Lady *Boughton* and *Farrer* had between them the whole estate, and they all join in the deed of 1800, to dispose of it by recovery. [*Mansfield* C. J. By that deed they make a good tenant to the precipe; and I suppose it will not be disputed by the Defendant, that a recovery suffered and a deed to lead the uses, will operate as a conveyance.] *Farrer* having by this recovery, before the birth of the daughter, conveyed away his estate, which was to support the entail to the daughter, which was a contingent estate, the entail drops: for even if there were no difference between the uses of the deed of 1800 and those of the first settlement, there has been a transmutation of possession which makes it impossible to hold that *Farrer* continued after that recovery to be seised of the same estate, which he had under the deed of 1799. In these circumstances as well Sir *Geo. Boughton* as Lady *Boughton* and *Farrer* become parties to the deed of 1802, in which Lady *Boughton* takes a power of appointment in fee, subject

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only to the eftate tail which her daughter *Frederica Emma Laura* takes under the third ufe of that fettlement, which is the firft intereft the daughter can take: the anfwers to the queftions therefore are, to the firft, that the deed of 1799 was not null and void. 2. That *Frederica Emma Laura* by the joint effect of the feveral deeds takes an eftate tail by the declaration of ufes which her mother was entitled to make in her favour. 3. The deed of 1799 being valid to certain purpofes, Sir *Geo. C. B. Boughton* takes nothing under that deed; but his power of appointment and his intereft are done away by the fubfequent events and transfers, and *A. B*, his appointee, takes no eftate. 4. *C. D.* the appointee of Lady *Boughton*, is to take only by will, not by deed, and is capable therefore of being changed at any time before the death of Lady *Boughton*; but if her will be not revoked, he will be entitled, fubject to the eftate tail of *Frederica Emma Laura*: he faid that appearing on behalf of the daughter only, he fhould contend that *C D.* had no eftate; but if he appeared on behalf of *C.D.* it would be his intereft to contend that the daughter had no eftate: but he did not fee how that propofition was to be fupported.

Williams, *contrà*, agreed that he fhould come nearly to the fame conclufion by a different courfe. It does not appear by the cafe, that the deed of 1800 was executed in prefence of two witneffes, which is neceffary. *Hawkins* v. *Kemp*, 3 *Eaft*, 440. In the deed of 1800 it is material to obferve that Sir *G. C. B. Boughton*, and Lady *Boughton* granted the premifes to *Farrer* for the life of Lady *Boughton*; *Farrer* was to vouch, not both, but Lady *Boughton* only: the ufes were to be fuch as fhe fhould appoint; and in default, to *Farrer* and his heirs during her life, with remainder to her in fee. They thus give to *Farrer* an immediate vefted eftate in poffeffion; before, he had it in remainder only. He is

 therefore

therefore the man against whom the precipe lies. What did Sir *George Boughton* convey by this deed? He before had an estate for his own life, and a vested remainder in fee; and as well the reversion to himself for life expectant on the decease of Lady *Boughton*, as also the fee may well pass; and by this lease and release conveying his fee, he extinguished his power of sole appointment. *Penn* v. *Peacock*, *Forrest*. 41., S. C. 2 *Eq. Cas. Abr.* 136. Lord *Talbot* held that a lease and release, or any other conveyance, will carry with them all powers that are joined to the estate. By the statute 14 *Eliz.*, *c.* 8, all recoveries had against any particular tenant, or against any other, with voucher over of such particular tenant, shall, as against all persons in remainder or reversion, be utterly void and of none effect. And therefore, though this recovery might be good against Sir *Geo. Boughton*, it was not good against them in the contingent remainders, and so, clearly void against the daughter. But see what estate *Farrer* had! He had an immediate estate in possession during the life of Lady *Boughton*, with remainder after the determination of that estate to himself during the joint lives of Sir *George* and Lady *Boughton*, and the life of the survivor; and his right of entry was sufficient to support the contingent remainders; so that instead of leaving a vested remainder in Sir *Geo. Boughton*, the vested remainder is conveyed to such uses as Lady *Boughton* should appoint, and for want of appointment, to *Farrer* and his heirs during the life of Lady *Boughton*, subject to the uses for the issue in the first deed, with remainder to Lady *Boughton* in fee. The last deed of 1802, made while the estate was thus circumstanced, is extremely material. The parties are Sir *Geo. Boughton*, who had nothing; *Farrer*, who was trustee to preserve the contingent remainders; and Lady *Boughton*. By this deed, before any of the contingent remainders subsequent on *Farrer*'s life estate came in *esse*, *Farrer* conveys the premises, as he legally might,

A. being seised in remainder during the life of *B.* and *C.*, and the survivor, in trust to preserve contingent remainders, takes an estate in possession to him and his heirs during the life of *C.*, to make him tenant to the precipe, and a recovery is suffered against *A.*, the contingent remainders are saved by the statute 14 *Eliz.* *c.* 8.

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might, by leafe and releafe. That deftroyed all the ufes of the firft deed, and let in the ufes of the fecond. If the fecond deed had not been made, but the firft only, and Sir *Geo. Boughton*, Lady *Boughton*, and *Farrer* had conveyed to other ufes, the fee would have paffed from Sir *Geo. Boughton*; and the contingent remainders being deftroyed, new ufes would have taken effect. The fame effect is produced by the operation of thefe two laft deeds taken together. The principle is clearly eftablifhed, 2 *P. Wms.* 678, *Manfell* v. *Manfell*, where the truftees to preferve the contingent remainders did not join in the feoffment of the tenant for life, but conveyed by a feparate leafe and releafe, and it was held that the contingent remainders were thereby deftroyed. The firft deed then is got rid of, not by the exercife of the power of appointment, but by fhewing that Sir *Geo. Boughton* conveyed away the fee by the fecond deed, and made it fubject to the power of appointment given to Lady *Boughton* in the third deed. *Frederica Emma Laura* does not take any eftate in the premifes under the deed and recovery of 1799, and the propofition recited in the deed of 1800, that the deed of 1799 was void, is not true, but *Frederica Emma Laura* did take an eftate tail under the deeds of 1800 and 1802, confequently Sir *Geo. Boughton* takes an eftate for life precedent to the eftate to his daughter, with remainder to Lady *Boughton* for life, with remainder to *Frederica Emma Laura* in tail. *A. B.*, the appointee of Sir *Geo. Boughton* is not entitled, and *C. D.* is not entitled, becaufe Lady *Boughton* can only appoint by will, and is ftill alive.

Lens in reply. The deed of 1800 may well operate as an appointment; for if the parties had the power of doing that which they purport to do, and have done it in fubftance, it fhall take effect: as a grant may enure by way of confirmation, and a confirmation by way of grant,

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grant, if the parties miſtake their reſpective intereſts. The ſtatute 14 *Eliz.* is not applicable, for it was intended to prevent a recovery from the tenant for life being ſuffered by covin. But here, the party againſt whom the recovery is had, had the next eſtate in remainder, and the remainder-man in fee joins, and therefore the recovery ſhall operate againſt all the eſtates that were in being, and they being deſtroyed, the contingent remainders drop. The truſtees to preſerve them can convey, although it be a breach of truſt: and theſe parties have the whole eſtate in them, no other perſon had any eſtate then ſubſiſting, and the ſimple way of conſidering the caſe is, to hold that the contingent remainders were deſtroyed by *Farrer*'s joining in the recovery: the land was conveyed to him for the very purpoſe of being recovered from him, and it is impoſſible to ſay that after the eſtate was recovered from him, he had any remainder or reverſion left. If therefore *Farrer* has deſtroyed his own eſtate, and has himſelf taken a new eſtate, and had that deſtroyed alſo, it is impoſſible to ſay that the contingent remainders are not deſtroyed. As there was no entail to be docked, the form of recovery was no longer material, but Sir *Geo. Boughton* grants a greater intereſt than could be ſerved out of his life eſtate, and which muſt therefore be ſerved, either out of his power of appointment, or out of his fee: whichever way of conſidering it is adopted, even if *Farrer*'s eſtate to preſerve contingent remainders ſurvived the ſecond recovery, it was deſtroyed by the laſt deed; and Sir *Geo. Boughton* has now nothing in him except his eſtate for life, and his ultimate remainder in fee, in caſe Lady *Boughton* ſhould die without making a good appointment by will. In ſuch caſe, and if the tenant in tail ſhould die without iſſue, *A. B.* might take, rather as grantee or deviſee, than as appointee of Sir *Geo. Boughton*.

Cur. adv. vult.

At

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At the end of this vacation the Court of Common Pleas sent to the Lord Chancellor the following certificate.

1st Answer.—Having heard the arguments of counsel upon this case, and considered the several questions proposed to us, we are of opinion that *Frederica Emma Laura*, the daughter of the said marriage, took an estate tail in remainder in the premises, by virtue of the deed and recovery of 1799; the proposition recited in the deed of the 27th day of *June* 1800, that the deed of the 1st *May* 1799 was absolutely null and void, not being true in law.

2d Answer.—We are also of opinion that the said *Frederica Emma Laura*, the daughter of the said marriage, did not take any estate in the premises by virtue of the deed of the 27th *June* 1800, the recovery suffered according thereto; and the deeds of 1802, or any of them.

3d Answer.—We are of opinion that *A. B.*, the appointee of *George Charles Brathwaite Boughton*, is entitled to an estate in fee simple, in remainder after the determination of the former estates created by the deed and recovery of 1799.

4th Answer.—We think that *C. D.*, the appointee of *Eliza Boughton*, is not entitled to any estate in the premises.

J. MANSFIELD.
J. HEATH.
S LAWRENCE.
A. CHAMBRE.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

AND THE

HOUSE OF LORDS,

IN

Hilary and Eafter Terms,

In the Fifty-firft Year of the Reign of GEORGE III.

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STEYNER *v.* COTTRELL.

Jan. 23.

An affidavit, the title of which ftyles the Plaintiff "affignee," without further explanation, is bad.

THE Plaintiff fued as affignee of a bail-bond. *Beft* Serjt. had obtained a rule *nifi* to fet afide the proceedings for irregularity.

Shepherd Serjt. fhewed for caufe, that the affidavits, on which the rule was obtained, were entitled *Steyner*, affignee, againft *Cottrell*, without explaining of whom or of what he was affignee. The Court held the defect fatal, and

Difcharged the rule.

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Jan. 25.

DOE, on the Demise of LORD CARLISLE, v. Bailiff and Burgesses of MORPETH.

If, upon a reference, either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is to move to set aside the rule of reference; but he cannot impeach the award.

THIS was an ejectment brought to recover 447 acres of land called the *Gubion*, otherwise the *Gudgeon*, otherwise the *High Moor*, otherwise the *High Common*. At the trial there was no doubt that the lessor was entitled to some land called the *Gubion*, and that the defendants had occupied it as tenants to him; but the defendants contended that the lessor was entitled only to a small farm called the *Gubion* farm, containing 50 or 60 acres, and distinct from the *High Common*, which they claimed to be their own soil and freehold. A verdict was taken by consent for the Plaintiff, referring it to a gentleman at the bar, "to ascertain the "boundaries of the *Gubion*, otherwise the *Gudgeon*, "otherwise the *High Moor*, otherwise the *High Com-* "*mon*." The Defendants, before the arbitrator, would have gone into evidence to confine the lessor's title to the *Gubion* farm, but he considered himself as precluded from going into any matter of title by the rule of reference, according to the terms of which, he defined the boundaries of that, which the terms of the rule described, namely, the whole premises in dispute. *Cockell* Serjt. had, in the last term, obtained a rule *nisi* to set aside the award, upon the ground that the arbitrator had refused to hear evidence of the Defendant's title to the *High Common*.

Lens Serjt. now shewed cause. The Defendants relied on the smallness of the rent, 10*l*., reserved in an ancient lease granted by the ancestor of the lessor of the plaintiff, as sufficient evidence to shew that the whole of this tract of land, now of very great value, was not demised by that lease; but this fact does not afford sufficient proof of their proposition.

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DOE, Lessee of LORD CARLISLE, *v.* Bailiff, &c. of MORPETH.

Cockell and *Clayton*, Serjts., contrà. The question to be tried was, of what land the *Gubion* consisted; the Defendants had an estate called the *High Moor*, distinct from this.

MANSFIELD C. J. The reference clearly supposes the *Gubion* and the *High Moor* to be the same thing, and that the lessor was entitled to them. We cannot, on such a rule of reference, set aside this award. The Defendant's motion, if any, ought to have been, to set aside the order of reference, upon affidavits shewing that it was drawn up by mistake. The award is perfectly right.

LAWRENCE J. The Defendants mean to contend that the Plaintiff is entitled only to the *Gubion*, and to so much of the *High Moor* as is commensurate with the *Gubion*: the point is decided by the award. The award cannot be consistent with the rule of reference, unless it finds the boundary of the *Gubion* as well as of the *High Common*.

Rule discharged.

HAGEDORN *v.* ALLNUTT.

Jan. 25.

The costs of a witness coming from beyond seas, are to be allowed only from his coming within the jurisdiction of this court.

BEST Serjt. moved that the prothonotary might review his taxation of costs in this cause, because he had refused to allow to the Plaintiff, who had obtained a verdict on a policy of insurance, the sum of 45*l.* for the costs of a witness whom he had been obliged to bring from *Hamburgh*. It was impossible, he said, that where witnesses are necessary to be brought from a foreign country, persons can prosecute their rights to recover any but very large sums, unless the costs of such

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witnesses are allowed. The Court enquired of the officer what the practice had been in the like cases; and found, that all the costs of bringing hither witnesses who came from abroad, had been allowed, until within a few years, when 7 or 800*l.* being claimed in one case for the costs of bringing over a single witness, the Court directed, that costs should be allowed only from the time of his coming within the jurisdiction of the process of this court; and that rule had since been adopted in all subsequent cases.

The Court thought that it would be a proper thing to re-consider that rule of practice, but that until it was overturned, it would be better to abide by it, and

Refused the rule (*a*).

(*a*) But the practice is now altered. See post. vol. 4. *Cotton* v. *Witt*, *Trin.* term 1811. *July* 1.

Jan. 26.

COLTMAN *v.* MARSH.

"I owe you not a farthing, for it is more than six years since," is not to be left to the jury as evidence of an admission, to take a debt out of the statute of limitations.

VAUGHAN Serjt. moved to set aside a nonsuit and have a new trial. The action was brought for the price of some glass sold. The Defendant pleaded the statute of limitations: the evidence given at the trial was, that the Defendant had said to the Plaintiff, "I owe you not a farthing, for it is more than six years since;" which *Vaughan* contended ought to have been left to the jury, to consider whether it did not amount to an admission of the debt. He referred, in support of this position, to Lord *Mansfield*'s doctrine in *Truman* v. *Fenton*, 2 *Cowp.* 548. *Lloyd* v. *Maund*, 2 *T. R.* 760. *Bryan* v. *Horseman*, 4 *East*, 599.

LAW,

LAWRENCE J. According to that doctrine, if a man pleaded *non assumpsit* and the statute of limitations, the plea of the statute of limitations would disprove the plea of *non assumpsit*. In the case of *Bicknell* v. *Keppel*, 1 *New Rep.* 20., where the Defendant wrote that his solicitors "were in possession of his determination and his ability," the Court held there was not enough in the word "ability," unexplained, to take the debt out of the statute. In this case the Defendant's clerk swore that the defendant's books of account had all been burnt, and the plaintiff's clerks were dead.

The Court was unanimous that there was nothing to be left to a jury, and

Refused the application.

FORT *v.* LEE.

Jan. 25.

It is not necessary to disclose to the underwriter on a policy at and from *London*, whether the ship has sailed or not.

A Policy was effected in *London* the 24th of *May* 1808 upon a ship on a voyage at and from *London* to her port of discharge, lost or not lost. The ship sailed on the last day of *April*, which fact was not disclosed to the underwriters; and a broker, who was called, said, that if he had known of the ship's sailing, he should have thought it a circumstance material to be communicated, although he admitted, that if at the time of effecting the policy she had sailed only a week, he should have thought it immaterial. The Plaintiff having obtained a verdict, *Best* Serjt. for the Defendant, now moved to set it aside, upon the ground, that the time of the ship's sailing was a material circumstance, and although known, had not been communicated to the underwriter.

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But the Court ſaid, that if the underwriter had wanted to know whether the ſhip had ſailed, he ought to have enquired, and unanimouſly

Refuſed the rule.

Jan. 26.

CORDER v. DRAKEFORD.

If a leaſe in writing, contain a contract for the purchaſe of goods, it cannot be given in evidence to prove the ſale of the goods unleſs it has a leaſe ſtamp.

Although it had an agreement ſtamp.

THIS was an action of aſſumpſit for the price of certain fixtures of the value of 57*l.* 15*s.* The Plaintiff, to prove his caſe, tendered in evidence an inſtrument in which the Defendant agreed to purchaſe the goods at the ſpecified price, but it bore only an agreement ſtamp, although it contained a preſent demiſe of the houſe in which the goods were. This inſtrument was rejected, as not being admiſſible evidence of the contract for the purchaſe of the goods, for want of a leaſe-ſtamp.

Beſt Serjt. now moved to ſet aſide the nonſuit. He contended that although the paper would not be admiſſible as evidence of the demiſe; he might nevertheleſs uſe it to aſcertain the value of the goods.

MANSFIELD C. J. It was never intended that the Defendant ſhould buy the fixtures if he could not have his leaſe of the premiſes. The one contract was auxiliary to the other.

LAWRENCE J. The contract for the goods as well as for the houſe, is by an inſtrument which amounts to a leaſe, and which the law ſays, muſt therefore have a leaſe ſtamp, and that unleſs it has ſuch an one, it cannot be given in evidence.

Rule refuſed.

1811.

BUCKNEY, Executrix, *v.* METHAM.

Jan. 29.

A mortgage deed, containing a covenant for the repayment of the money, is within the meaning of the stat. 3 *Jac.* 1. *c.* 8., a contract upon which bail in error is neceſſary.

THE Plaintiff had obtained judgment in debt on the covenant for repayment of the money contained in an indenture of mortgage: the Defendant having ſued out a writ of error, but not perfected bail in error, the Plaintiff ſued out execution.

Vaughan Serjt. having obtained a rule to ſet aſide the execution for irregularity, upon the ground that the practice had hitherto been to require no bail in this caſe, under the ſtatute 3 *Jac.* 1. *c.* 8., as not being a contract within the meaning of that act,

Lens Serjt. now ſhewed cauſe. A contract under ſeal is not therefore the leſs a contract, becauſe it happens to be under ſeal. In *Butler* v. *Bruſhfield*, 10 *Eaſt*, 407., it was indeed held, that bail in error was not requiſite in the caſe of debt on a bond conditioned for performance of all the covenants in an indenture as well as the payment of money; but the reaſon of that was, becauſe the ſtatute expreſsly mentions an obligation with condition for the payment of money only, which excludes all bonds with other conditions, but that reſtriction applies only to bonds.

Vaughan contrà. This is a new attempt. The legiſlature could not have meant to include under the term contract, an inſtrument under ſeal of ſo high and ſolemn a nature as this. It has been holden that an action for goods ſold and delivered is not an action upon a contract. [*Mansfield* C. J. It is very difficult to ſay upon what reaſon that ever came to be ruled. As to the bond for performance of covenants, if it were good for one

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covenant, it was good for all.] In *Butler* v. *Brushfield*, though the bond was for performance of all covenants, the covenant for the payment of the money was the only one on which a breach was assigned, and the only one, so far as appeared, into which the defendant had entered.

MANSFIELD C. J. It is impossible to contend that a covenant is not a contract.

Rule discharged with costs.

Jan. 29.

STEVENS v. INGRAM.

If a writ of error is sued out before final judgment, but the allowance not served until after the writ of error is spent, the Plaintiff may afterwards regularly sign final judgment.

THE Plaintiff obtained an interlocutory judgment on 1st of *June*, in *Easter* term. The defendant in the same term sued out a writ of error, returnable on the first return-day in *Trinity* term, which was allowed on the 4th of *June*, in *Easter* term. The plaintiff was not served with the allowance of the writ of error until after it was spent: but in *Michaelmas* term, on the 9th of *November*, after the service of the allowance, he taxed his costs, and signed final judgment, that being the earliest time at which he could have signed it.

Shepherd Serjt. had obtained a rule *nisi* to quash the writ of error;

Best Serjt. shewed cause upon the authority of *Jacques* v. *Nixon*, 1 *T. R.* 280, where it was held that a plaintiff could not lie by till a writ of error was spent, and sign judgment afterwards.

Shepherd supported his rule by the distinction, that there the Plaintiff had notice, by being served with the allow-

allowance of the writ of error, on the ſame day that it was allowed. Here, the writ of error was ſpent before there was any ſervice of allowance, or notice of it.

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The Court held that the Defendant ſhould have waited until the Plaintiff taxed his coſts, before he took out his writ of error. The writ of error was ſpent when the allowance was ſerved, and therefore judgment might be ſigned.

Rule abſolute.

LAUGHTON *v.* RITCHIE.

January 29.

In an action on a deed made beyond ſeas, the Defendant relying in ſome of his pleas on matters of defence which neceſſarily imported the execution of the deed, the Court would not permit him to plead *non eſt factum*.

COCKELL Serjt. had obtained a rule *niſi* to plead ſeveral matters in an action upon a charter-party by deed; viz. 1. *Non eſt factum*; 2. Payment of freight, and ſome others.

Shepherd Serjt. now ſhewed cauſe. The charter-party was made in the *Weſt Indies*, and a witneſs muſt be brought from thence with great delay and expences to repel the firſt plea, and as the other pleas pretty clearly ſhew that the charter-party has been executed, the Court will reſtrain the Defendants from pleading *non eſt factum*.

Runnington Serjt., for *Cockell*, *contra*.

The Court made the rule abſolute to plead all the pleas except the firſt.

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February 5.

Samuels *v.* Dunne.

If a Defendant files two pleas at several times on the same day, in order to mislead the Plaintiff by the second plea, the Plaintiff may sign judgment.

Although a Defendant conducts his cause in person, if he files a special plea, it is a nullity, unless it be signed by a serjeant or counsel.

ASSUMPSIT on a bill of exchange, for work and labour, &c. The declaration was delivered on the 16th of *November*, with notice to plead within 4 days. The Defendant, who was a surgeon in the navy, and conducted his cause himself, on the 20th of *November* first caused a plea of the general issue to all the counts to be put on the file: he afterwards, on the same day, but after many other pleas had been put on the file, caused to be filed a plea of *non assumpsit* to the first count, and a special demurrer to the other counts, assigning frivolous causes of demurrer; this demurrer was not signed by counsel. The plaintiff, upon searching for a plea, found the plea last filed, and not conceiving that there could be another plea, and deeming himself entitled to treat this as a nullity, because it was not signed by counsel, on the 21st of *November* signed interlocutory judgment. *Best* Serjt. on a former day had obtained a rule *nisi* to set aside that judgment, upon an affidavit made by the Defendant, that he had in due time, and previous to the signing of the judgment, pleaded a regular plea of the general issue.

Vaughan Serjt. shewed cause upon an affidavit of the Plaintiff's attorney, that he, having found the plea and special demurrer above-mentioned, had been misled by them.

The Court directed an inquiry to be made, which of the two pleas was first filed; and upon the officer reporting that the simple plea of *non assumpsit* was first filed, the Court held that the second plea was a deceit, which should not avail the Defendant.

Best

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Best then urged, that as the Defendant conducted his cause in person, it was not necessary that his special plea should be signed by counsel.

But *the Court* held that the signature of a serjeant or counsel was nevertheless necessary, and

Discharged the rule with costs.

LEER v. YATES.
LEER v. COWELL.
LEER v. GORST.

Feb. 8.

A general ship took brandies on board, under bills of lading, which allowed 20 lay days for delivery of the goods in *London*, and stipulated for 4*l*. *per* day demurrage afterwards. Certain of the consignees chusing to have their goods bonded, the vessel could not make her delivery at the *London* docks until 46 days after the 20 days: some of the goods, which were undermost, could not, though demanded, be taken out till the upper tiers were cleared: held that each of those consignees was liable, on a general count for demurrage, to pay the 4*l*. *per* day for the 46 days.

THE Plaintiff in each of these causes declared in *assumpsit*, complaining that the Defendant had promised to take out of the Plaintiff's ship, within a reasonable time after her arrival, certain brandy which the Plaintiff had brought for him to *London*, but neglected so to do, whereby his vessel was detained. Another count alleged a promise of the Defendant to take out the brandy within a reasonable time after notice to the Defendant of the ship's arrival, and the third count was *indebitatus assumpsit* for the use of the ship *Mariana* of *Hamburgh*, whereof the Plaintiff was master, by the Defendant retained and kept on demurrage with certain goods on board, for a long time, at the Defendant's instance.

The Defendants, *Yates* and *Gorst*, pleaded the general issue: the Defendant *Cowell* paid into court on the third count the sum of 16*l*., upon a computation of the share which each of the several freighters who had put goods on board, must have contributed, in order to make up one sum of 4*l*. per day between them, if all had become liable to demurrage.

Upon

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Upon the trial of these causes, at *Guildhall*, at the sittings after *Trinity* term 1810, before *Mansfield* C. J., it appeared, that the master of the vessel, which was a general ship, having a *British* licence, had taken on board at *Bourdeaux* the goods consigned to the several Defendants, and also goods for many other consignees, and had signed and delivered to each of the shippers a bill of lading, whereby he acknowledged "the shipping on "board the *Mariana* of the goods," (describing them,) "to be taken out in twenty days after arrival, or to pay "four pounds per day demurrage:" the bill of lading limited the master's responsibility by containing the usual exception of "the act of God, the king's enemies, fire, "all dangers of the seas, rivers, and navigation, save "risk of boats, so far as ships are liable thereto." The *Mariana* arrived in the *London* docks on the 17th of *June*. If all the consignees would have paid the duty on their respective goods, the vessel might have been speedily discharged at other licensed wharfs, which were open for that purpose, but they all preferred bonding their brandy, and the quays and warehouses of the dock, at which alone bonded goods could be landed, were at that time so full, that there was not room to receive more goods to be bonded, in consequence of which, and of the number of vessels then waiting to discharge their cargoes, the vessel was detained until the first of *September*, before the other vessels which lay between the *Mariana* and the quay had been discharged, and before it came to her turn to be unloaded, and to have her cargo received into the warehouses. Eighty puncheons of brandy, which were delivered on that day, lay above the Defendant's casks, and their goods, therefore, could not, in the ordinary course of delivering the ship, be taken out, until the eighty puncheons which lay above them were delivered, although with additional labour in moving the goods they might have been sooner taken out, under

under the inſpection, of the ſuperintendant of the docks. It was in evidence that the Defendant *Cowell* had frequently demanded a delivery of his goods, which was not complied with, the Defendant ſaying it was impoſſible to get at the caſks; and once, in particular, he had obtained an order from the dock company, permitting two caſks to be landed upon payment of the duties, but the Plaintiff, on application, ſaid, he could not get at them on account of the ſuperincumbent cargo. The Defendant *Cowell* had executed a bond for the duties ſo early as the 22d *Auguſt*, and the Plaintiff admitted that he, *Cowell*, had made every exertion for landing the goods which depended upon his acts. It did not appear that the Defendants *Yates* or *Gorſt* had made any demand of their goods, nor had either of the three paid, or offered to pay the duties, without doing which, *Cowell's* order from the dock company, permitting the delivery, could not have been carried into effect. The jury in each caſe found a verdict for the plaintiff on the 3d count, with 184*l.* damages, being the amount of demurrage, at 4*l.* per day, for 46 days, the time which had elapſed from the 7th of *July*, when the 20 days allowed for delivery of the cargo expired, to the 7th of *September*, on which day the laſt of the Defendant's caſks were taken out. The judge reſerved liberty for the Defendants to move to reduce the verdict.

Lens Serjt. in *Michaelmas* term 1810 obtained rules *niſi* to ſet aſide theſe verdicts and enter nonſuits: he moved, upon the ground that a general claim for demurrage ariſes only in the caſe, where the delay, whether cauſed by the act of the Defendant, or not, has been beneficial to, and occaſioned in the ſervice of the Defendant. The delay which had ariſen from the extent of the commerce of the country, co-operating with the law which reſtricted the place of delivery of theſe goods to the *London*

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London docks only, was a misfortune, which fell with equal hardſhip on the Plaintiff and on the Defendant; but it did not render the Defendant anſwerable to the Plaintiff for the conſequences.

Shepherd and *Beſt* Serjts. in this term ſhewed cauſe. The Plaintiff does not found this action upon any miſfeaſance or nonfeaſance of the Defendant. The bill of lading contains evidence of a contract to pay demurrage if the ſhip be detained beyond a certain number of days, from what cauſe ſoever that detention may ariſe, and of the rate at which that demurrage is to be compenſated. There is nothing illegal in making ſuch a contract, and the Court cannot inquire into the prudence or imprudence of it. It may be preſumed that the Plaintiff foreſaw that this port was overloaded with imports, and therefore previouſly ſtipulated, that if his veſſel was not diſcharged within a certain number of days, he ſhould be paid for his further detention, whatever might be the cauſe of it. And as ſuch a contract may ſubſiſt, ſo there is no reaſon why the Plaintiff may not under ſuch a contract recover, on a general count for demurrage, upon the evidence of the bill of lading, in like manner, as in an action for goods ſold and delivered, he may recover on the evidence of a contract for the ſale of the goods at a particular price. Wherever a contract has been executed, the ſum due on that contract may be recovered on a general count. As to the ſuppoſed unreaſonableneſs of this contract, the number of perſons who may chuſe to enter into ſimilar contracts with the Defendant cannot affect the caſe; the compenſation agreed to be paid by one, would not, alone, be ſufficient to indemnify the Plaintiff for the delay. It was in evidence that the expences of the ſhip amounted to ten guineas a day, and only three of the conſignees had incurred demurrage upon ſimilar bills of lading, ſo that no very large profit reſulted

resulted from the transaction; and since it was uncertain whether the Plaintiff might obtain freight from more than one person, it was competent for him to form the like engagement with as many as offered. This is not a joint contract with the twenty consignors who may have goods on board this vessel, stipulating that they shall between them pay 4*l.* per day demurrage, and if it were, how could the sum be apportioned, when each takes out his goods on a different day? In the case of *Randall* v. *Lynch*, 2 *Camp. N. P.* 352. it was held that the necessary delay, occasioned by the crowded state of the *London* docks, did not excuse the freighter from paying demurrage for the ship's detention.

Lens and *Vaughan* Serjts., in the two first of these cases, and *Cockell* Serjt. in the last, *contrà*. The Plaintiff first attempted to charge the Defendant upon the ground of a supposed default in him, but that ground failing, he resorts to the ground of mere detention, to which the Defendant is no wise instrumental. The counts which aver a contract to take out the goods in a reasonable time, must be laid out of the question, since the evidence of the bill of lading specifies the time, 20 days. The importance of the subject to the commerce of this country is such, that the case of *Randall* v. *Lynch*, which was decided only at *nisi prius*, though it was the impression made on a very learned mind, deserves to be more fully considered. The words which are supposed to raise this obligation, are the language of the plaintiff, by him inserted in a bill of lading, which he delivers to the shipper abroad, a person probably ignorant of the state of circumstances here; how it came to be so inserted, does not appear: the bill of lading is not signed by the Defendants, and it is as yet a new question, whether the acceptance of goods, accompanied with the delivery of a bill of lading, will amount to a contract; and if it does, whether

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whether it be the effect of such a contract to raise this claim. The necessary inconvenience now incident to every ship which enters the port of *London*, is equally notorious to both parties, but this agreement does not refer to that inconvenience, nor affect to obviate it. That burthen is therefore left, by this contract, where the law places it. It appears by the Plaintiff's own instrument, that 4*l.* *per diem* is a sufficient compensation for the detention of the vessel. If twenty persons then, have accepted such bills, it must be a *nudum pactum* as to all except the first. It was in evidence too, that no delay was occasioned by the Defendants, but the delay arose from the 80 puncheons which lay above the Defendants' goods; the latter could not have been gotten out, until the former were previously discharged, without extraordinary exertions, which exertions it belonged to the Plaintiff to make: therefore, even if the law were as the Plaintiff contends, the demurrage must be reduced from the 46 days, to the period which elapsed between the 1st of *September*, when the 80 superincumbent casks were removed, to the 7th, when the last of the Defendants' goods were discharged: and as to the Defendants *Yates* and *Gorst*, it was not attempted to shew on what day they could have been permitted by the officers of the dock to receive their goods, if they had been willing to pay duty for them instead of bonding them. It is urged that the Defendants are liable for the whole delay, because they intended to bond the whole of their goods; but the Plaintiff ought to have done that which he has not attempted, to have shewn how soon the whole could have been discharged if the Defendants had been willing to pay duty for the whole; because from the expiration of that time only could the charge of laches rest with the Defendants. But it is incumbent on the Plaintiff to shew that he had done every thing which on his part was requisite towards the discharge of the ship, before he can

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urge any nonfeasance of the Defendants, as a ground for charging them with this sum, for it is at least a concurrent, if not a precedent condition, that the Plaintiff should place the goods in a situation ready for delivery; but here, if either of the Defendants had paid the whole duties, his goods were in such a situation that he would have been unable to obtain them. The count, too, is for detaining the whole of the ship, whereas the evidence proves but the detention of a small part.

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the opinion of the Court.

It is impossible to decide these three very singular cases without being struck with the enormous gain which the owner may get by this bill of lading; and which may possibly much exceed what in justice and conscience he ought to have. This is a general ship; thirty or forty persons may have goods on board, and for every one of them the owner may have his 4*l.* *per* day. It was said indeed, that in fact the 4*l.* *per* day for these three persons would not much exceed the fair charge for the demurrage of the whole ship: but it might have happened that many more persons might have become liable, and a much larger profit might have accrued. I was struck very much with the argument, that it was not the fault of the Defendant, but the fault of the Plaintiff himself, that these goods could not be got out till the other goods which lay above them were delivered. But it is not, in truth, the fault either of the Plaintiff or Defendant, that the goods could not be taken out. There can be only so many goods at the top of the vessel as the proper stowage of the goods will allow, therefore all the others must be at the bottom; and as this is a general ship, and the goods do not all belong to the same consignee, the goods of some of the consignees

 must

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must be undermost. If this argument would avail, therefore, that the captain is not entitled to demurrage for those goods which were not uppermost, it would restrain the contract for demurrage to the few persons whose goods were at the top, but that construction would be contrary to the positive contract; for it is impossible to get out of the words of this bill of lading, which, though it is a singular species of contract, to bind a consignee by an instrument signed not by himself, but by the captain, yet as the consignors delivered the goods on board under that bill, and the Defendants accepted that bill of lading, it is binding upon them, and therefore this action may be sustained on the general count for demurrage, and consequently the

Rule must be discharged.

Feb. 8.

Muller v. Gernon.

An order of council permitting the consignee of goods coming from an enemy's country without a licence, to land them here, on condition of immediately re-exporting them, does not so legalize the voyage, as to enable the master of the ship to recover his freight.

THIS was an action brought to recover the freight of certain brandies brought by the Plaintiff from *Charente* to this country. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, before *Mansfield* C. J., it appeared that the importation was intended to have been made under the sanction of a *British* licence, which was granted to the Defendant by the King in council on the 2d of *December* 1808, to continue in force for six months, and which expired in *June* 1809. The Plaintiff's vessel was detained in *France* by an embargo, which lasted two years, and he did not sail with this cargo until *May* 1810: the cargo therefore became contraband; but the Defendant, upon his petition to the privy council, was permitted to land the cargo, upon condition of immediately again exporting the same. The defence set up to the action, was, that the

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the importation having become illegal, the Plaintiff was not entitled to recover: he, however, contended, that the effect of the order in council, which permitted the Defendant to land the goods here, was such as to continue the original licence in force down to the time of landing the goods; and that consequently, the voyage being legal, the Plaintiff was entitled to recover his freight, and he accordingly obtained a verdict.

Lens Serjt. had, on a former day in this term, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit; against which

Best Serjt. now endeavoured to shew cause, contending that as the Defendant was now in actual possession of the cargo, it was not competent for him to set up so unrighteous a defence, and also arguing that the order of council could not legalize the landing of the goods here, without impliedly legalizing the voyage that brought them hither; he also referred to those cases in which a voyage continued after the expiration of a licence has been considered as legal.

The Court, stopping *Lens*, dismissed the last point from their consideration, because it had not been made at the trial, and held that, as to the principal question, there was nothing in it; the order of council did nothing more than give up the King's right of seizure of these goods, and had by no means the same effect as a continuation of the licence would have had. Freight was the reward which the law entitled a Plaintiff to recover for bringing goods lawfully into the country upon a legal voyage, but the voyage here was clearly illegal, therefore he could recover nothing, and there must be a nonsuit.

Rule absolute.

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Feb. 9.

PAYNE, Demandant; NATHANIEL, Tenant; HODGES, Vouchee.

Recovery amended by substituting a certain part of a parish which lay within a liberty, for the other part of the parish, which lay within a borough.

ONSLOW Serjt. moved to amend a fine and recovery according to the deed to make a tenant to the *præcipe*, which bore date in 1766. The fine and recovery described the premises to be in the parish of *St. Margaret*, in the borough of *Leicester*, in the county of *Leicester*. The affidavit on which this motion was made stated, that the parish of *St. Margaret*, in the county of *Leicester*, was divided into two parts, one of which was situate within the borough of *Leicester*, and the other within a liberty called the *Bishop's Fee*, which was in the county, but not within the borough, and that the premises intended to be comprized in this fine and recovery lay in that part of the parish of *St. Margaret* which was within the *Bishop's Fee*, and not in that part which was within the borough of *Leicester*, and were so described in the deed.

The Court permitted the fine and recovery to be amended, by striking out the words, "in the borough "of *Leicester*," and substituting the words "in that part "of the parish of *St. Margaret* which lies in the *Bishop's* "*Fee* in the county of *Leicester*."

CALLAGHAN *v.* AYLETT.

Feb. 9.

If a bill be accepted, payable at a banker's, it must be presented there for payment, and the neglect so to present it is equally a discharge to the acceptor as to the drawer.

THIS action was brought against the Defendant as the acceptor of a bill of exchange, drawn by the Plaintiff upon the Defendant, at four months after date, for 68*l.* 4*s.* value received in feathers, payable to the Plaintiff's order. The declaration averred that the Defendant, on sight of the bill, accepted it "according to the usage and custom of merchants." There was also a count in the declaration for goods sold and delivered. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, the bill being produced, appeared to be accepted payable at Messrs. *Ramsbottoms*, bankers, *London*. *Clayton* Serjt. for the Defendant, made two objections to the plaintiff's right to recover; first, that there was a variance between the acceptance proved, which he said was an especial one, making the bill payable at a particular place only, and not elsewhere, and the acceptance averred in the declaration, which was general; secondly, that there was no proof that the bill had been presented for payment at the place where by the acceptance it was made payable. The bill had been given for the price of goods sold and delivered; but the Plaintiff's counsel, relying on the bill, gave no evidence of the sale of the goods. A verdict passed for the Plaintiff, subject to the opinion of the Court upon these two objections, the Judge reserving the points.

Clayton on a former day in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground that it was necessary for the Plaintiff to prove a presentment at the banker's where it was made payable: he moved this upon the authority of *Ambrose* v. *Hopwood*, 2 *Taunt.* 61.

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Marshall Serjt. now shewed cause. The case cited does not govern this case, for that was an action against the drawer, not against the acceptor, and the objection came by surprize on *Onslow* Serjt.; but if it had been an action against the acceptor, the averment that the bill was duly presented to Messrs. *Freeman* would have been sufficient. [*Heath* J. There can be no difference in that respect between an action against the drawer and an action against the acceptor.] In *Saunderson* v. *Judge*, 2 *H. Bl.* 509., the drawer of a note, (who stands in the same predicament as the acceptor of a bill of exchange, made it payable at the house of *Saunderson* and Co., his bankers; and it was urged that it ought to have been there presented for payment, and that it ought to have been averred that it was so presented; but the Court held that it was no part of the contract that the note should be paid at the house of *Saunderson* and Co., and that therefore that was not necessary to be stated in the declaration. [*Heath* J. In *Saunderson* v. *Judge*, it was a memorandum written by *Sharp* at the foot of the note, not a part of the instrument.] In 7 *East*, 385., *Parker* v. *Gordon*, it was indeed held, that if an acceptance makes a bill payable at a banker's, for the purpose of charging the drawer, it must be presented there within banking hours, for that the party taking such a special acceptance, impliedly agrees to present it where by the acceptance it is made payable. But in the case of *Lyon* v. *Sundius and Another*, 1 *Campb.* 423., the Plaintiff, an indorsee, declared against the acceptor, generally averring an acceptance according to the usage and custom of merchants. The bill was accepted payable at Messrs. *Hankey* and Co.'s, *London*, and *Park*, for the Defendant, objected that it ought to be declared on as a special acceptance; but Lord *Ellenborough* C. J. said, " how can you make the words, at *Hankey* and Co.'s more than a mere memorandum? The acceptor of a bill of ex-

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change is liable univerfally. This very point was brought before the Court fome time ago, when the Judges were all of opinion that fuch words formed no part of the contract, and did not require to be fet out in the declaration." So (*a*), if a promiffory note be made payable at a particular place, in an action againft the maker, there is no neceffity for proving that it was prefented there for payment. *Per Bayley* J. *Wild* v. *Rennards*, fittings in *Hil.* term 1809, 1 *Campb.* 425. *n.* The Court cannot hold with this objection without over-ruling all thefe late decifions of the Court of King's Bench. But fuppofing the Plaintiff fhould not fucceed on this ground, he is entitled to a new trial; for he was prepared to prove the fale of the goods, which were the confideration for the bill, under the count for goods fold and delivered.

The Court, ftopping *Clayton*, who was prepared to fupport his rule, held, that doubtlefs there may be a qualified acceptance of a bill, which the holder is not bound to receive, but if he acquiefces in it, he muft conform to the terms of it. As to the goods fold, the plaintiff exercifed his judgment at the time of the trial, and relied on the point of law faved for him: if he had wifhed to avail himfelf of his confideration, he fhould have then proceeded to prove it.

Rule abfolute to enter a nonfuit.

(*a*) But that in the cafe of promiffory notes made payable at a particular place, it is neceffary to aver a prefentment and refufal at that place; fee the cafe of *Bowes* v. *Howe*, in error, in the Exchequer Chamber, *June* 25, *Trinity* term 1813, poft. vol. 5,

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Feb. 11.

SMITH *v.* RUSSELL.

Semble, that a sheriff is not bound to find out what rent is due to a landlord and pay it him under 8 *Ann.* c. 14, unless the landlord gives him notice.

If goods remain on demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before.

ROUGH Serjt. had on a former day obtained a rule *nisi*, requiring the sheriff to pay over to Mr. *Isaac Pitcher*, the landlord of a house in which an execution had been levied, out of the proceeds of the execution, the amount of rent due to the lessor, not exceeding one year's rent; against which, *Best* Serjt. now shewed cause. It appeared from the affidavits on the one side and on the other, that the landlord never made any demand upon the sheriff for the rent, but that the wife of the Defendant, whose family then resided in the house, apprized the Plaintiff, who on the 7th of *December* purchased the goods under a bill of sale from the sheriff, and who on the 20th began to remove them, that on the 25th of *December* three quarters rent would become due. The purchaser, however, persisted in removing them, and the landlord swore he believed it was done with intent to defeat his distress. It appeared, however, that the defendant's wife had at that time the bill of sale in her own custody, so that there was no doubt but that the sale was fraudulent.

Best objected, first, that the goods had never been removed by the sheriff, but that when he had completed his duty, they still remained on the premises liable to the distress; so that there was no ground for calling on the sheriff: secondly, that the landlord had given no notice to the sheriff that rent was due, which, he contended, was necessary. *Waring* v. *Dewberry*, 1 *Str.* 97. *Palgrave* v. *Windham*, 1 *Str.* 212. *Hankell* v. *Kempell*, 2 *Wils.* 140.

Rough contended that a fraudulent sale did not discharge the sheriff from the duty of retaining and paying over

over to the landlord the rent due. It was doubtful whether the officer were not bound to make enquiry whether any and what rent was due; but, at all events, if it by any means came to his knowledge that there was rent in arrear, he was bound first to satisfy the landlord. He endeavoured to distinguish this case from *Waring* v. *Dewberry*, *Palgrave* v. *Windham*, and *Cook* v. *Cook*, *Andrews*, 219. He also referred to *Darling* v. *Hill*, *Cas. temp. Hardwicke*, 255., and *Twells* v. *Colville*, *Willes*, 375.

HEATH J. The sheriff cannot always find a landlord to enquire of. In this case, too, he does not remove the goods: there is no ground for making this rule absolute, nor is this a fraudulent removal within the stat. 8 *Ann.* c. 14. All the cases say, that the statute is made to protect the landlord from a fraudulent collusion between the Plaintiff and Defendant by means of an execution, and here the landlord is not prejudiced. I do not think the sheriff is bound to go and find the landlord and give him notice.

LAWRENCE J. After this fictitious bill of sale the goods remained on the premises, and were liable to the landlord's distress, and he had nothing to do but to distrain them. I need not go into the question, whether the sheriff is bound to give notice to the landlord, though in the case in *Strange* it seems that it was expressly held, that the landlord must give notice to the sheriff.

Rule discharged (*a*).

(*a*) *Mansfield* C. J. was absent this day, in consequence of indisposition.

1811.

Feb. 13.

Doe, on the Demise of Whitfield, *v.* Roe.

The mortgagee of a leafe has the fame title to relief againft an ejectment for non-payment of rent, and upon the fame terms, as the leffee againft whom the recovery is had.

WHITFIELD, by a leafe dated 3d *Nov.* 1807, demifed to *J. Cruwys* two meffuages in *Sloane-ftreet*, for the unexpired refidue of a term of 20 years, at 52*l.* 10*s.*; and by indenture of 4th *Jan.* 1810, *Cruwys* affigned the leafe to *Carden* for fecuring repayment of 150*l.* and intereft, fubject to a provifo for redemption upon repayment, which fum ftill remained due. Three quarters of a year's rent being in arrear, *Whitfield* diftrained, and there not being fufficient effects on the premifes, he ferved a declaration in ejectment on *Cruwys*, who was in poffeffion, and in due courfe figned judgment againft the cafual ejector for want of a plea; and having had the premifes delivered to him by the fheriff under a writ of poffeffion, he demifed them for 14 years to *Killick*, who had fince expended a confiderable fum in improving them. Under thefe circumftances, and upon an affidavit of *Carden* that he knew nothing of the ejectment until after the writ of poffeffion was executed, the Court had, on a former day in this term, granted *Beft* Serjt. a rule *nifi*, that upon payment by the mortgagee to the leffor, of the rent arrear, and cofts of the ejectment and of this application, the mortgagee might have the premifes given up to him,

Lens Serjt. now fhewed caufe againft this rule. He contended that the ftatute 4 *Geo.* 2. *c.* 28. *f.* 2. had given the Court no jurifdiction to interfere in this cafe, more than it had before that ftatute, and that it could not relieve before then. At all events, if it had jurifdiction, it could only relieve upon the payment of all the leffor's cofts and damages, which damages muft include fuch damages as the leffor would become liable to pay to *Killick*

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DOE, Leſſee of WHITFIELD, v. ROE.

Killick in conſequence of his ouſter after expending much money in improvements of the premiſes.

Beſt, *contrà*, cited *Downes* v. *Turner*, 1 *Salk.* 597., that before this ſtatute the Court would relieve againſt an ejectment for non-payment of rent, upon bringing all the rent into court, accepting a new leaſe, and ſealing a counterpart. *Goodtitle* v. *Holdfaſt*, 2 *Stra.* 900. *acc.*

The Court held that there was no diſtinction between leſſee and mortgagee: if indeed the mortgagee's eſtate had become abſolute, the mortgagee was actual tenant; and they made the

Rule abſolute (*a*).

(*a*) *Mansfield* C. J. was abſent this day, in conſequence of indiſpoſition.

NEESOM *v.* WHYTOCK.

Feb. 12.

Any perſon other than the Defendant making an affidavit of merits to ſet aſide an interlocutory judgment, muſt either ſwear that he is the Defendant's attorney's managing clerk, or the Defendant's attorney.

VAUGHAN Serjt. had obtained a rule *niſi* on the uſual terms for ſetting aſide an interlocutory judgment, upon an affidavit of merits made by *A. Mitchell*, clerk to the Defendant's attorney.

Beſt Serjt. ſhewed cauſe, upon the ground that the deponent had not ſworn that he was either the Defendant's attorney, or managing clerk to the Defendant's attorney.

The Court admitted that the objection was correct, and diſcharged the rule.

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Feb. 12.

HAYNES v. JONES.

A writ may be ferved on the day on which it is returnable, and notice of declaration may be given at the fame time.

VAUGHAN Serjt. moved to fet afide the declaration and fubfequent proceedings in this cafe for irregularity. On the 9th of *February* the defendant was ferved at *Colchefter*, 52 miles from *London*, with the copy of a writ returnable on that day, being in eight days of the Purification; and at the fame time he was ferved with notice, dated the fame day, of a declaration being filed conditionally, and demand of a plea within eight days, otherwife judgment. *Vaughan* relied on the cafe of *Steward* v. *Lund*, 12 *Eaft*, 116. that this was irregular.

But *the Court*, after reference to the officers, held, that a writ may be ferved on the fame day on which it is returnable, and that a declaration may be filed upon the return-day of the writ. The ground of the Defendant's complaint was, that he had more notice given him of the declaration than the Plaintiff was compellable to give. The only effect of delivering the declaration and writ together, was, that the Plaintiff could not in that cafe charge the Defendant for the declaration; and they rejected the application.

Rule refufed.

Feb. 12.

Mayor, &c. of DONCASTER v. COE.

If the fame fpecial jurymen are ftruck to try feveral caufes on the fame queftion, and the Court being diffatisfied with the verdict in the firft, direct it to abide the event of another caufe, they will alfo, on motion, difcharge the fame fpecial jurymen from trying the fecond caufe.

ACTIONS of trefpafs had been brought by the corporation of *Doncafter* againft this and another Defendant, to affert the exclufive property of the corporation

to

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to certain river-banks and other lands, which the Defendants contended to be either of public right, or subject to easements enjoyed by themselves individually. In both causes special juries were struck, consisting of the same persons, and one of the causes having been tried, the Court directed that the verdict should be set aside, and that the cause should abide the event of the trial of this cause, upon the ground that the jury had found a verdict contrary to the weight of the evidence (a).

Cockell Serjt. had on a former day obtained a rule *nisi*, that the rule obtained for having a special jury in this cause might be discharged, and that this cause might be tried by the common panel.

Clayton Serjt. now shewed cause. He contended, first, that no case had been cited to shew that the Court had jurisdiction to discharge the special jury: the statute was imperative, that the cause should be tried by the special jury once struck; the words were, "*shall be tried.*" Secondly, there had been no case shewn to require this extraordinary interposition.

Rough Serjt., in the absence of *Cockell*, supported the rule. The Court have thought fit that another trial shall take place upon this question, and if the present cause, which is to bind the other, were to be tried by this special jury, it would be tried, though not before the same panel, yet by the same men, who came to so erroneous a conclusion in the former instance; such a trial would not answer the end which the Court proposed, in directing that cause to abide the event of the trial of this.

(a) See Mayor of *Doncaster* v. *Day*, *ante*, 262.

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HEATH J. It is a fufficient ground for this motion, that the fame jurymen have tried a fimilar caufe. The former part of this rule, fo far as relates to difcharging the fpecial jury, muft be made abfolute; the latter part need not be granted.

LAWRENCE J. As to the queftion of jurifdiction, fuppofe there were corruption in the jury, hath not the Court authority to difcharge them? for the argument goes to that length. There is no need of citing authorities; the fame perfons have tried this queftion in another caufe: that circumftance muft neceffarily create in them a bias.

Rule abfolute to difcharge the rule for the fpecial jury.

Feb. 12.

SPITTA v. WOODMAN.

If the Plaintiff recover a verdict for a lofs on a policy, and endeavour, on a rule *nifi* being obtained for a nonfuit, to fupport his verdict to the extent, although he be held entitled to a return of premium, he is not entitled to the cofts of the rule. Nor to any cofts, except of the count for money had and received, and of fuch parts of the brief and evidence as apply thereto.

SHEPHERD Serjt. moved that the prothonotary might review his taxation of cofts; a verdict had been found for the Plaintiff as for a total lofs; and a motion was made in the next term, (*ante*, vol. 2. p. 416.) for a rule *nifi* to fet afide the verdict and enter a nonfuit. The Court held, upon the difcuffion of that rule, that the Plaintiff was not entitled as for a total lofs, but that he was entitled to a return of premium. Upon the taxation of cofts, the prothonotary did not think himfelf at liberty to allow the Plaintiff the cofts of that motion, the Court not having faid any thing about cofts. On a fimilar motion to this in the Court of King's Bench, the Court allowed the cofts on this fort of motion (*a*). *Routh* v. *Thompfon*. There, a fpecial cafe was referved, to

(*a*) This cafe, but not this point, is reported 11 *Eaft*, 428.

to try whether the Plaintiff was entitled as for a total loſs; and if not, whether he was entitled to recover as for a return of premium. The Defendant had not paid the premium into court. The Court held, that he was not entitled to recover a total loſs, but that he was entitled to a return of premium; and nothing was ſaid about coſts. The maſter of the King's Bench did not allow any coſts, except thoſe of the count for money had and received, and ſuch parts of the briefs and evidence as apply to it; but the Court of King's Bench directed the maſter to review his taxation. In this caſe, as in that, although the Defendant was entitled to ſome relief, he made an improper motion, and compelled the Plaintiff to come hither to reſiſt the exceſs of his motion, for he moved for a nonſuit, whereas he ſhould have moved to reduce the damages.

HEATH J. In *pari conditione*, neither party muſt pay coſts. There muſt be no coſts on either ſide; the prothonotary has done very rightly.

LAWRENCE J. The Plaintiff did not confine his reſiſtance to the rule, to a mere aſſertion of his claim to recover the premium. He was ſquabbling for more.

Rule refuſed.

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TENNYSON, Demandant; GOULTON, Tenant; ROUSBY, Vouchee.

A recovery 98 years old, amended by inserting a manor and tithes, without affidavit of intention that they should pass, the intention being manifest from the deeds, and the possession having gone accordingly.

Though there was no other evidence of the existence of a manor, than the mention of it in an old deed, and the appointment of a gamekeeper.

LENS Serjt. moved to amend a recovery suffered in *Hilary* term, 1 *Geo.* 1. of lands in *Sledmere* in the county of *York*, by inserting the words "*manerium de Croome cum pertinentiis,*" before the words, "*duo messuagia,*" &c., and by also adding the words, "*necnon* "*omnes et omnimodas decimas garbarum, bladorum, grano-* "*rum, et fœni, et omnes alias decimas quascunque, annuatim* "*et de tempore in tempus provenientes, vel renovantes, de,* "*ex, et infra manerium et villam, sive hamlettum, de* "*Croome prediĉtum, decimis lanæ et agnorum solummodo* "*exceptis,*" after the word *Sledmere*, in the record of the recovery, the exemplification thereof, and all the several entries and process to perfect the same, upon payment of the additional fine, if any, at the alienation office, and all usual and customary fees at the same, and the several other offices. He moved this upon a statement, that the family of *Rousby* had purchased this estate in 1672, and that by a deed made 24th *April* 1683, all the estate and hereditaments, (which last word would carry tithes in a deed,) of the then possessor of the name of *Rousby*, within the hamlet of *Croome*, had been limited in tail; and it was objected by a late purchaser, that that entail still subsisted as to this manor and tithes, unless the recovery suffered in 1714 were amended. At this distance of time, it was not possible, he said, to have the usual affidavit of the intention of the parties, but it was held in the case of *Gladwyn* v. *Brown*, *ante* 2. 1. that such affidavit was unnecessary where the distance of time was so great. The deed to make a tenant to the *precipe* for the recovery suffered in 1714, after enumerating the lands, conveyed to the re-lessee, "all other the lands,

 "tene-

" tenements, and hereditaments of *H. Rousby*, lying and " being within the townships, precincts, and territories " of *Croome* and *Sledmere*, or either of them, or else- " where, together with all and singular other the " houses," &c. He also produced the affidavit of *S. Vines*, a devisee in trust to sell under the will of *H. E. Rousby* deceased, and for six years a receiver of the rents of the estate under a decree of the Court of Chancery, which stated, that the Deponent was well acquainted with the testator's estates, and that they were situate in the hamlet of *Croome* in the parish of *Sledmere*, in the county of *York*, and that they consisted of, amongst other things enumerated, the manor or reputed manor of *Croome*, together with the tithes of the whole of the hamlet of *Croome*, with the exception of the tithes of wool and lamb within the same, which were claimed by the impropriator of the rectory of *Sledmere*. That the manor of *Croome* was described in the indenture of 24th *April* 1683, as " the manor or reputed manor or lord- " ship of *Croome*," but that there were no freehold or copyhold tenants, and therefore the only fruit of the seignory had for many years been the appointment of a gamekeeper, which had been exercised without question; that the tenants of the estate, some of whom had been 60 years in possession, had dealt with the deponent for a renewal of their expiring leases upon a representation made by them, that the tithes of their respective farms, which were commensurate with the hamlet of *Croome*, except the tithe of wool and lamb, belonging to the impropriator of *Sledmere*, did belong to the proprietor of the estate, and were in no wise to be accounted for by the occupiers.

The Court permitted the amendment.

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SAUVAGE *v.* DUPUIS. (*a*)

The Defendant agreed by parol to rent a houfe, as tenant from year to year, for the refidue of a term, which was three years and three quarters: he held for three years and one quarter, and quitted. Ruled, that though perhaps he might have quitted without notice at the end of three years, yet the remaining longer implied a contract to pay rent for the refidue of the term.

ASSUMPSIT. The Plaintiff declared that he was poffeffed of a meffuage for the refidue of a term, which expired at *Lady-day* 1810, as tenant to *J. H.* under an indenture of leafe, by which the Plaintiff covenanted to repair during the term, and once in every three years thereof to paint the parts ufually painted, and peaceably to furrender at the end of the term the premifes fo repaired and painted, together with the fixtures, and thereupon, upon the 26th of *June* 1806, in confideration that the Plaintiff would demife the premifes to the Defendant, to hold of the Plaintiff, during the term of one year from *Midfummer-day* then laft paft, and fo on, from year to year, until the expiration of the term, the Defendant undertook during fuch tenancy to perform all the covenants on the tenant's part contained in the leafe, and avers that he demifed to the Defendant accordingly; but that the Defendant did not repair, paint, or quietly furrender the premifes repaired and painted, with the fixtures. There was another count upon a promife by the Defendant to repair in confideration of his tenancy, and a count for ufe and occupation. Upon the trial of this caufe at the *Middlefex* fittings after the laft *Michaelmas* term, before *Mansfield* C. J., it was proved that the Plaintiff was poffeffed of a leafe, as ftated in the declaration, for a term of 7 years, commencing from the 25th of *March* 1803, which he propofed to affign to the Defendant, as from *Midfummer* 1806, who, upon the faith thereof, in *July* 1806, en-

(*a*) *Mansfield* C. J. was abfent this day owing to indifpofition.

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tered; but after he was in poffeffion, it appeared that there was a covenant in the leafe reftrictive of alienation, and the leffor, on application, refufing licence to affign, the Defendant continued in poffeffion, without any written contract, under a parol agreement, that "he fhould hold as tenant from year to year, during the refidue of the term." The Defendant paid rent from time to time, and a little before *Lady-day* 1809 gave notice of his intention to quit the premifes at the enfuing *Michaelmas*, and accordingly quitted the premifes a week before *Michaelmas* 1809. The Plaintiff, by a particular delivered, claimed a fum for dilapidations, and the rent to *Lady-day* 1810. *Beft* Serjt. for the Plaintiff, contended, that the Defendant, having entered and occupied, muft be taken to hold on the terms on which he would have held, if the firft contract had been effectuated, and the leafe affigned, in which cafe his tenancy would have terminated at *Lady-day*, and this being a contract executed, might be enforced without regard to the ftatute of frauds. *Shepherd* Serjt., *contrà*, contended that the contract, as ftated in the declaration, was repugnant, for if he held from year to year, he could not hold for three years and three quarters certain, nor could a holding from year to year, which commenced at *Midfummer*, terminate at *Lady-day*; and a parol contract for a term of three years and three quarters was void by the ftatute of frauds. *Mansfield* C. J. thought the Defendant was tenant from year to year, commencing from *Midfummer* 1806, but that he could not under fuch a tenancy hold the premifes for the fourth year, becaufe that would endure to *Midfummer* 1810, whereas the intereft of all parties expired at *Lady-day* 1810. The notice to quit at *Michaelmas* 1809 was ineffectual, in any view that could be taken of the contract; and as there was no proof of any want of

 repairs,

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repairs, he nonfuited the Plaintiff, with liberty to move to enter a verdict for 21*l.*, the half-year's rent computed to *Lady-day* 1810, if the Court fhould be of opinion that the Plaintiff was entitled to recover it.

Beft having accordingly obtained a rule *nifi*,

Shepherd and *Vaughan* Serjts. fhewed caufe. The contract being by parol, was not good as an affignment of the refidue of the term, for an affignment muft, now, be in writing; it was not good as a leafe, becaufe it was for a greater term than three years, and a contract of demife for a greater term than the ftatute of frauds authorizes, cannot enure for three years, parcel of the term, and be void for the refidue. It therefore created only a tenancy from year to year, which muft be for entire years, and not for fractional parts of a year. The contract is not merely for a tenancy from year to year, but for a tenancy from year to year during the refidue of the Plaintiff's term. There muft be fome meaning given to thofe laft words: they are not merely infenfible. The true conftruction is, that this, like other tenancies from year to year, fhould be determinable at the end of any one year, if half a year's previous notice were given by either party; but that, although no fuch notice were given, it fhould determine of itfelf fo foon as the eftate of the Plaintiff, not having another integral year remaining thereof, ceafed to furnifh materials for the longer duration of the tenancy from year to year. This tenancy, therefore, expired at the end of the three years; and the Defendant was free then to quit the premifes: he continued, however, another quarter, during which he was a mere tenant at fufferance, an eftate which was determined by his removing from the premifes, and which required no previous notice to determine

mine it. It is contended that this was a contract to let the premifes to the Defendant fo long as the Plaintiff's intereft therein lafted: but as that contract would not be binding on the Plaintiff, becaufe of the ftatute of frauds, fo neither is it binding on the Defendant. This differs much from the ufual cafe, where a man occupying a houfe for half a year, becomes liable for a year's rent, under an inference, which the law gives, of a contract for a whole year; here the parties could not, even by exprefs words, have contracted for another year, for there was not a year remaining, and when no longer a year remained, a year's tenancy could not be implied.

Beft would have fupported his rule.

HEATH J. We are all of opinion, that as this was a letting from year to year, the tenant having continued to hold after the three years, muft be confidered as continuing to hold on the fame conditions for the refidue of the term.

LAWRENCE J. At the *Chriftmas* before the Defendant went out, he might have given notice of his intention to quit at the *Midfummer* then following; and then there would have remained nine months for the landlord: or, poffibly, at the end of the three years, though he had given no notice, he might have been at liberty to quit: but he does not do that; he holds for three months more, and I think it may therefore be implied that he contracted to hold for the refidue of the term, upon the fame conditions upon which he had held from year to year.

1811.
Sauvage v. Dupuis.

Chambre J. I do not know but that the Defendant might have held from year to year for the three years, and quitted at the end of them without notice: but here, having commenced his tenancy of the remaining period, it muſt be taken that he held for that period on the ſame terms as before, ſo far as they were applicable.

Rule abſolute.

END OF HILARY TERM.

(IN THE HOUSE OF LORDS.)

1811.

Huffam and Another *v.* Ellis. In Error.

April 10.

An averment that a bill, accepted payable at bankers, was, when due, preſented to the bankers for payment, according to the tenor and effect of the bill, and of the acceptor's acceptance thereof, and that as well the bankers as the acceptor refuſed payment, ſhall be ſupported after judgment on a ſham plea.

And it ſhall be intended that the bill was preſented for payment to the acceptor himſelf at the houſe of thoſe perſons, *Semble.*

For evidence of thoſe facts would be admiſſible under ſuch an allegation, and not repugnant to it.

ASSUMPSIT, brought by original, in the Court of King's Bench, by the Defendant in error, againſt the Plaintiffs in error, as the drawers and indorſers of a bill of exchange. The declaration ſtated that the Plaintiffs in error made their certain bill of exchange in writing, and directed the ſame to one Mr. *Wm. Robertſon*, merchant, *Great St. Helens*, and thereby required him three months after date, to pay to them or their order 426*l.* 16*s.*, which bill the ſaid *William Robertſon* afterwards, according to the uſage and cuſtom of merchants, on ſight thereof, accepted, and expreſſed the ſame to be payable at the houſe of certain perſons uſing the names, ſtyle, and firm of *Kenſington, Styan*, and *Adams*: and after averring an indorſement to *Godin Shiffer* and *Ellis*, and a ſecond indorſement by them to the Defendant in error, it was averred, that afterwards, and when the bill became due, (to wit) on the 4th day of *Auguſt* 1810, the ſaid bill was ſhewn and preſented to the perſons ſo uſing the names, ſtyle, and firm of *Kenſington, Styan*, and *Adams*, for payment thereof, according to the tenor and effect of the ſaid bill, and the ſaid *William Robertſon*'s acceptance thereof, and the ſeveral indorſements ſo made thereon; but as well the ſaid laſt-mentioned perſons, as the ſaid *William Robertſon*, then and there refuſed and neglected to pay the ſame. To this declaration the Plaintiffs in error pleaded a ſham plea of a judgment recovered in the Court of Common Pleas, to which the Defendant below replied, and in *Hilary* term laſt obtained judgment upon failer of the record; and the Plaintiffs in error aſſigned for error;

 that

1811.
HUFFAM and Another *v.* ELLIS; In Error.

that the bill was not averred to have been presented for payment at the place where the same was in and by the said acceptance made payable, but was only alleged to have been presented to those persons for payment; and stated the following reasons in favour of the reversal.

1st. Because the drawer, or indorser, of a bill of exchange, is not liable to be sued upon it, unless it be duly presented for payment to the acceptor at the place by him appointed for the payment thereof; and such presentment must be shewn in a declaration against the drawer. *Ambrose* v. *Hopwood*, 2 *Taunt.* 61. 2d. Because, by the declaration it appears, that the bill was neither presented to the acceptor, nor at the place appointed for its payment, but was presented to certain other persons, who were strangers to it. 3d. Because the loose and general words, "according to the tenor and effect of "the said bill of exchange, and of the said *W. Robert-"son*'s acceptance thereof, and of the said several indorse-"ments so made thereon as aforesaid," which are found in this declaration, can be of no avail. They are repugnant to the previous special allegation, in which the manner of the presentment is precisely shewn; and by which it appears, that the bill was not presented according to the tenor and effect of the acceptance.

C. Abbott.

The Defendant in error joined in error, and prayed that the judgment given by the Court of King's Bench might be affirmed for the following, among other, reasons.

1st. Because the declaration and the matters therein contained are sufficient in law, under the aforegoing circumstances, for the Plaintiff below to have and maintain his aforesaid action against the said Defendants below. 2d. Because the declaration avers, that the bill of exchange in question was shewn and presented to the persons

ſons uſing the ſtyle and firm of *Kenſington*, *Styan*, and *Adams*, for payment thereof, according to the tenor and effect of the ſaid bill, and the ſaid *William Robertſon*'s acceptance thereof, which averment to be true in fact, as laid, muſt of neceſſity imply that ſuch bill of exchange was preſented for payment where by the tenor of the acceptance made payable, and is equivalent to a direct averment thereof in terms. 3d. Becauſe, if the Defendants below intended to diſpute the fact of the ſaid bill being preſented according to the tenor and effect thereof and of the ſaid acceptanee, they ought to have put it in iſſue below, and cannot ſet up the ſame after judgment; and that by the courſe they then thought proper to take, it is evident their object was, and is, delay, and nothing elſe. *Giffin Wilſon.*

The caſe was argued on this day, and the authorities of *Ambroſe* v. *Hopwood*, *Ruſhton* v. *Aſpinall*, *Doug.* 654. *Parker* v. *Gordon*, 7 *Eaſt*, 385. were referred to.

The Court ordered and adjudged that the judgment of the Court of King's Bench ſhould be affirmed.

Note, The reporter was not preſent at the deciſion of this caſe. But Lord *Erſkine* is ſaid to have expreſſed himſelf, that if there had been no ſuch averment as could have led to proof of the due preſentment, the declaration would have been bad; but it muſt be apparent, that upon that allegation, due preſentment might have been proved. It would be dangerous to allow ſuch ſubtleties to prevail. Lord *Eldon*, Chancellor, is reported to have ſaid, 'The more the counſel for the Plaintiff in error ſatisfies me that a preſentment at the place where the bill was made payable, was neceſſary, the more he ſatisfies me that I muſt intend by this allegation, that ſuch a preſentment was made. See the caſe of *Bowes* v. *Howe*, in the *Exchequer-chamber*, in error, *Trinity* term, 1813. *poſt*, vol. 5.

CASES

ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Eafter Term,

1811.

In the Fifty-firft Year of the Reign of GEORGE III.

May 3.

ANONYMOUS.

The Court refufed to amend a recovery by changing the county, the premifes lying in a parifh which ran into two counties, and lying wholly in the county omitted, and no part in the county mentioned.

VAUGHAN Serjt. moved to amend a recovery fuffered more than 60 years fince of lands defcribed in the deed declaring the ufes, as lying in the parifh of *Appleby*, and defcribed in the recovery to lie in the county of *Derby*, by ftriking out the words county of *Derby*, and fubftituting the county of *Leicefter*, upon an affidavit that the parifh of *Appleby* lies partly in the county of *Derby*, and partly in the county of *Leicefter*, and that the premifes were wholly fituate in that part of the parifh of *Appleby* which lay in the county of *Leicefter*, and no part of them in that part of the parifh which lay

in

1811.

ANONYMOUS.

in the county of *Derby*. Only one recovery had been suffered of them, not one in each county.

The Court held that there must be a new recovery: it was impossible to change the recovery from one county to another, and

Refused the application (*a*).

(*a*) See *Wainwright*, Demandant; *Seagrave*, Tenant; *Smyth*, Vouchee; *ante*. i. 538. *Ideo quære* of the case of *Rashleigh*, Demandant; *Lee*, Tenant; *Smith*, Vouchee; *Trinity* term 1813, *post*, vol. 5., where the Court amended by changing the county.

VIOLETT *v.* ALLNUTT.

May 4.

Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured.

IN this action, the Plaintiff declared upon a policy of insurance, at and from *Plymouth* to *Malta*, with liberty to touch at *Penzance*, or any port in the Channel to the westward, for any purpose whatever, upon goods by the ship *Lion*, beginning the adventure from the loading thereof on board the said ship as above. The Plaintiff averred that the ship was in good safety at *Plymouth*, bound upon the said voyage, and that divers goods of great value were there loaded on board her: and that afterwards the ship, with the said goods on board, sailed from *Plymouth* on her intended voyage, and in the course thereof proceeded to and touched at *Penzance*, for the purpose of loading and taking in there other goods and merchandizes for *Malta*; and that whilst she was there, other goods of great value were there, to wit, at *Penzance*, loaded on board the said ship, to be carried therein from thence to *Malta*, and that the Plaintiff was interested in the goods. That in the course of the voy-

1811.

VIOLETT v. ALLNUTT.

age the ſhip was ſtranded and upſet, and the Plaintiff not only ſuſtained a loſs upon his goods to the amount of 40*l.* per cent., but a general average loſs alſo accrued upon the ſhip, her freight, and cargo, and the Plaintiff in reſpect of his ſaid ſeveral goods became liable to, and did contribute to ſuch general average loſs, to the amount of 30*l.* per cent. more on the value of ſuch goods, and averred the Defendant's liability, notice and refuſal to pay. This cauſe was tried upon admiſſions at the ſittings after *Hilary* term 1811, before *Lawrence* J. The only material facts were, that the Plaintiff, intending to ſhip goods on the voyage inſured, to the amount of 3130*l.* 14*s.*, cauſed inſurances to be effected for that ſum: that the goods loaded on board the *Lion* at *Plymouth* amounted, including charges, to 1880*l.* 6*s.*: that the ſhip proceeded from *Plymouth* to *Penzance* for the purpoſe of completing her lading, and there received on board, on account of the Plaintiff, the remainder of her cargo, conſiſting of 651 hogſheads of preſſed pilchards, amounting, including charges, to 1249*l.* 8*s.* That while the ſhip was lying at *St. Michael's Mount Pier*, at *Penzance*, waiting for a favourable wind to proceed on the voyage, ſhe was ſtranded, and the cargo received damage, by which a general and a particular average was incurred. That the general average, and the particular average, upon the goods taken in at *Plymouth*, amounted together to the ſum of 23*l.* 8*s.* 6*d.* per cent., which the Defendant had paid into court, and the particular average on the goods loaded at *Penzance* amounted to 19*l.* 12*s.* 4*d.* per cent., which the Defendant contended he was not liable to pay by the terms of the policy in queſtion. It was agreed that the only queſtion to be tried was, whether the Defendant was liable for the loſs on the goods taken on board at *Penzance*; and that in caſe a verdict ſhould be found for the Plaintiff, the ſame ſhould be entered for 39*l.* 4*s.* 8*d.*, being the remainder of the ſum claimed in

this action. The jury having found a verdict for the Plaintiff, 1811.

VIOLETT *v.* ALLNUTT.

Lens Serjt. on this day moved to set it aside, upon the ground that the permission to touch at *Penzance* did not include the touching there for the purpose of taking in a further cargo, and that, by the terms of the policy, the insurance attached only on the cargo to be loaded at *Plymouth*.

But *the Court* held there was no ground for the objections, and

Refused the rule.

HORWOOD *v.* HEFFER.

May 4.

No ill-treatment by the husband of the wife, short of personal violence, or such as to induce a reasonable fear of it, will enable a stranger to maintain *assumpsit* against her husband for necessaries furnished to her subsequently to her leaving his house.

THIS was an action of *assumpsit* against the husband for board, lodging, and necessaries furnished to the Defendant's wife. Upon the trial of this cause at *Westminster*, at the sittings after *Hilary* term 1811, before *Lawrence* J., the Plaintiff was nonsuited on his opening by the learned Judge, without going into the evidence, the facts alleged being, that the Defendant had treated his wife with great cruelty; had taken another woman into the house, with whom he cohabited; that he had confined his wife in her chamber under a pretence of insanity; and that she had escaped; and the present action was brought for the value of necessaries furnished to her after her departure. *Best* contended at the trial, that this treatment was equivalent to turning the wife out of doors; and he cited *Hodges* v. *Hodges*, 1 *Esp. N. P. C.* 441., in which Lord *Kenyon* C. J. held, that ill-treatment which rendered the wife's stay unsafe, was equivalent to turning her out of doors.

Best

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HORWOOD
v.
HEFFER.

Best now moved to set aside the nonsuit, and have a new trial.

LAWRENCE J. You did not state any apprehension of her personal safety; you principally dwelt on the circumstance of the Defendant's having placed a profligate woman at the head of his table, and having told the wife, that if she did not like to dine there, she might dine in her own chamber: I thought, that, however improper that conduct might be, and however abhorrent from the feelings of a delicate woman, she might nevertheless have had necessaries, if she had staid there. She might, if she had thought fit, have sued for alimony, and a divorce a *mensâ et thoro*.

MANSFIELD C. J. If this suit were maintainable, it would be necessary that the jury should, in the first place, determine whether the wife lawfully left her home or not; this would wholly supersede the necessity of a suit for alimony, or a divorce a *mensâ et thoro*. I think nothing short of actual terror and violence will support this action.

Rule refused.

1811.

JACOBS v. NELSON.

May 4.

An averment of an undertaking to carry goods to *R.* to be delivered to *C. B.*, to be paid for on delivery, ſhews with ſufficient certainty that the price of the goods was to be paid by *C. B.*, the conſignee, to the carrier.

THE Plaintiff declared that in conſideration that he had cauſed to be delivered to the Defendant a crate of glaſs of great value, viz. of the value of 10*l.*, to be carried by the Defendant from *London* to *Rayleigh*, and there to be delivered to one *Charles Bryan*, to be paid for on delivery, for certain reaſonable hire or reward to the Defendant, the Defendant undertook to carry and deliver the goods, and receive the money for them on delivery; and aſſigned for breach, that though the Defendant did carry the goods, ſhe did not receive the money for the Plaintiff. After verdict for the Plaintiff,

Shepherd Serjt. now moved in arreſt of judgment, upon the ground that it did not appear what price the Defendant was to receive for the goods, nor by whom it was to be paid.

The Court held it was ſufficiently intelligible that the perſon to whom the goods were to be delivered was to diſcharge the price of them, and

Refuſed the Rule.

1811.

May 4.

Cates *v.* Hardacre.

A witnefs may object to anfwer a queftion which he thinks will tend to his crimination, though the anfwer would not lead to an immediate conclufion of guilt.

THIS was an action by an indorfee againft the drawer of a bill, drawn, payable to the drawer's order, upon *Stratton*, and by him accepted and afterwards difhonoured; it was ftated in the declaration to have been indorfed by the Defendant to the Plaintiff. The cafe was tried before *Heath* J. at *Weftminfter*, at the fittings after laft *Hilary* term. The Plaintiff proved his cafe. The defence intended to be fet up was ufury. The firft witnefs called on the part of the Defendant was one *Taylor*, and the bill having been put into his hands, he was afked by *Shepherd* Serjt. for the Defendant, "whether that bill had ever been in his poffeffion before;" upon which *Beft* Serjt. interfered, by afking the witnefs whether he had not been indicted for ufury in this tranfaction, and upon his anfwering in the affirmative, *Beft* cautioned him againft anfwering queftions which might tend to criminate him; the witnefs faid that he thought his anfwer to the queftion propofed would have a tendency to convict him of the offence of ufury; the learned Judge told him that if he thought fo, he was not bound to anfwer the queftion: the witnefs availed himfelf of this direction, and the counfel for the Defendant being thus prevented from purfuing his enquiry, a verdict paffed for the Plaintiff.

On this day *Shepherd* Serjt. moved for a new trial, contending that the Judge's direction was wrong; that it was not fufficient that a witnefs thought that his anfwers would tend to criminate him; but that it ought clearly to appear that they would have that effect.

MANS-

1811.
CATES
v.
HARDACRE.

MANSFIELD C. J. Your queſtions go to connect the witneſs with the bill, and they may be links in a chain.

Rule refuſed.

PYEWELL *v.* STOW.

May 4.

A perſon may aſſiſt bail in taking, and may lawfully detain the principal, although the bail do not continue preſent.

THIS was an action of treſpaſs and falſe impriſonment. The Defendant pleaded that *Wilſon* had brought an action againſt the Plaintiff, and that *Williams* became his bail to that action, at whoſe requeſt the Defendant gently laid hands on the Plaintiff, to aſſiſt *Williams* in taking him, and kept him a reaſonable time, and diſcharged him. The Plaintiff replied, that although true it was, that *Williams* had become ſuch bail, the Defendant of his own wrong impriſoned the Plaintiff. Upon the trial before *Graham* B. at the ſpring aſſizes 1811, on the *Oxford* circuit, the evidence was, that *Williams* pointed out the Plaintiff to the Defendant, while the Plaintiff, who had become a bankrupt, was attending before the commiſſioners; that the Defendant took him and carried him to a public houſe, and there detained him, in expectation of receiving directions from *Williams*, (who had gone away and left them together) what was to be done with him, but after a conſiderable time receiving none, he further detained him until he paid the Defendant five ſhillings, and then diſcharged him. Upon this evidence the Plaintiff was nonſuited.

Shepherd Serjt. now moved to ſet aſide the nonſuit, upon the ground that, ſuppoſing the Defendant to be well authorized by *Williams* to take and keep the Plaintiff,

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PYEWELL
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STOW.

tiff, yet when *Williams* went away, the Defendant had no longer authority to detain him.

MANSFIELD C. J. The Plaintiff ought to have newly affigned.

LAWRENCE J. Surely it is not neceffary that the bail fhould conftantly continue in the prefence of the principal, in order to juftify the detaining him by another. If he relied on the excefs, he fhould have ftated in his replication, that after the bail had difcharged him, the Defendant detained him until he paid the five fhillings.

Rule refufed.

May 4.

PROSSER, Clerk, v. GORINGE.

An arbitrator to whom the queftion of the right of two rectors to the tithe of certain lands, was referred, had power to devife all means to prevent future litigation between the parties, and to fettle all matters in difference between them, and to determine what he fhould think fit to be done by either of the parties, touching the matters in difpute. Held, that he did not exceed his power by awarding undivided moieties of the tithes to the two rectors.

THIS was an action of trover for tithes, which came on to be tried at the *Lewes* fummer affizes 1810, before Lord *Ellenborough* C. J., upon whofe fuggeftion the caufe was referred to a gentleman at the bar, under the following order, the Reverend *Thomas Poole Hooper*, clerk, rector of *Kingston Bowfey*, in the county of *Suffex*, confenting to be made a party thereto, and to be bound by the reference and award thereby directed, it was ordered, by and with the confent of the parties, their counfel and attornies, that a verdict fhould be entered for the Plaintiff, damages 500*l.*, cofts 40*s.*, fubject to the award of the arbitrator, who was thereby empowered to direct that a verdict fhould be entered for the Plaintiff or the Defendant as he fhould think proper, and to whom it was thereby referred, to afcertain what lands were feverally titheable to the rectors of *Southwick* and

King-

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Kingston Bowſey, and what deſcription of tithe was due to each in reſpect of the farm lately occupied by *Colville Bridger*, to deviſe all means to prevent future litigation between the parties to that order, or between any or either of them during the joint incumbencies of the Plaintiff as rector of *Southwick*, and *T. P. Hooper*, as rector of *Kingston Bowſey*, and generally to ſettle all matters in difference between the parties to that order, any, or either of them, and to order and determine what he ſhould think fit to be done by either of them reſpecting the matters in diſpute, who agreed to be bound and concluded by ſuch determination, and to remain contented and ſatisfied therewith. The arbitrator awarded that a verdict ſhould be entered for the Defendant, and further, that it having then become impoſſible, touching the matters referred, to aſcertain and diſtinguiſh the particular parcels of land, to the tithes of which the rectors of *Southwick* and *Kingston Bowſey* were reſpectively intitled, he awarded that one fourth part of all the great and ſmall tithes growing due from the farm lately occupied by *Colville Bridger*, was the right and property of *T. P. Hooper*, rector of *Kingston Bowſey*, and that the remaining three fourth parts of ſuch tithes were the right and property of the Plaintiff, rector of *Southwick*. And he further awarded, that one fourth part of all the great and ſmall tithes growing due from ſuch part of the weſt ſide of *Southwick* as formerly lay in tenantry, or was the ſheep down, adjoining to, though not being part of, the farm lately occupied by *Colville Bridger*, was likewiſe the right and property of *T. P. Hooper*, rector of *Kingston Bowſey*; and that the remaining three fourth parts of ſuch laſt mentioned tithes were the right and property of the Plaintiff, rector of *Southwick*.

1811.

PROSSER v. GORINGE.

Best Serjt. had on a former day obtained a rule *nisi* on behalf of the Plaintiff, for setting aside this award. It appeared by the affidavits sworn on the part of the Defendant, that at the *Lewes* summer assizes 1802, two causes came on to be tried before Lord *Kenyon* C. J., the one being an action brought by the Plaintiff against *John Norton* Esq., the lessee of the Reverend *Charles Williams*, the then rector of *Kingston Bowsey*, for the tithes of the lands called *Southwick West Laines* and the *Down* belonging thereto, lying on the west side of *Southwick*, due in the year 1798, and the other against the present Defendant, as lessee of *Charles Williams*, for the tithes of the same lands for the year 1799, and upon that occasion those causes were, (with the consent of *C. Williams*, who was made a party to the order,) referred to the award of a learned Serjeant, to settle all matters in difference between the parties; upon which occasion oral and written testimony, to the effect given before the present arbitrator, was given, and whereupon the then arbitrator awarded that *C. Williams*, as rector of the rectory of *Kingston by Sea*, was legally and justly entitled to take and receive tithes, as well great as small, yearly or otherwise arising, growing, and accruing from part and parcel of the lands commonly called *Southwick West Laines*, and the *Down* belonging thereto, lying on the west side of *Southwick*; and although from the evidence produced before him on that reference, he could not, consistently with justice, ascertain, specify, or describe out of what lands in particular, as part and parcel of the lands called *Southwick West Laines* and the *Down* belonging thereto, the tithes to which *C. Williams*, as such rector, was entitled, did arise or accrue, yet, as to the whole of the tithes arising therefrom, the arbitrator did award, that *C. Williams*, as rector of the rectory of *Kingston by Sea*, was legally and justly entitled to take and

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and receive one fourth part or ſhare of the tythes, but no more, and that the Plaintiff, as rector of the rectory of *Southwick*, was entitled to receive the other three fourth parts thereof. And that after the death of *C. Williams*, the Plaintiff, being thereby ſet at large, commenced the action now referred. It was further ſworn, that the tithes ſubmitted to both awards, and awarded as due and ariſing from ſuch part of the weſt ſide of *Southwick* as formerly lay in tenantry, or was the ſheep *Down*, adjoining to (though no part of) the farm lately occupied by *Colville Bridger*, were the ſame tithes as were meant and intended to be ſubmitted by the order of *niſi prius* to the award of the preſent arbitrator, and were in fact included therein, under the general authority of ſettling all matters in difference between the parties, any, or either of them; the tithes ariſing from the lands called *Southwick Weſt Laines* and the *Down* belonging thereto, being matters in diſpute between the parties, the Plaintiff claiming the whole thereof, and *T. P. Hooper* claiming one fourth part thereof from the Defendant. It was alſo ſworn that from the evidence of the ſeveral witneſſes produced by the parties before the arbitrator, (ſome of whom were very old,) and from the deeds, terriers, maps, and documents produced by the parties to and left with the arbitrator, it had appeared that the farm lately occupied by *Colville Bridger*, and the lands which formerly lay in tenantry on the weſt ſide of *Southwick*, or were the ſheep *Down* adjoining, (which farm and lands were then in the occupation of the Defendant and others, and the tithes of the whole whereof were in diſpute as aforeſaid,) formerly conſiſted of ſeveral ſmall farms, ſome of which were titheable to the pariſh of *Kingston Bowſey*, and the remainder to the pariſh of *Southwick*, and the whole of which farms lay very much interſperſed together in very

 ſmall

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ſmall pieces, and that ſuch farms had, for nearly a century paſt, been laid together.

Shepherd Serjt. now ſhewed cauſe againſt this rule. The arbitrator was correct in awarding a verdict for the Defendant; for, if the Plaintiff brings trover, he muſt prove the ſpecific goods to be his, and that he cannot do, as the arbitrator has expreſsly found; therefore, the award is more favourable to the Plaintiff than he had a right to expect. The power being ſo ample, to award what the arbitrator ſhall think fit to be done, he had power to award that the parties ſhould accept undivided moieties, when he could not aſcertain the boundaries of the particular land out of which the tithe of the reſpective parties was to iſſue.

The reverend Plaintiff ſupported his rule in perſon, and after lamenting that his too great deference for the opinion of the learned Judges who had preſided at *niſi prius*, had in three different inſtances induced him to refer his right to the tithes in queſtion, pending diſcuſſions with three ſucceſſive rectors of *Kingſton Bowſey*, to arbitrators, who, in each inſtance, had bound him by erroneous awards, and expreſſing his determination that ſhould he outlive the preſent rector, no ſimilar weakneſs ſhould induce him to compromiſe his common law rights without bringing them before the Court, he ſtated, (for being unacquainted with the practice of the court, he was unprepared with any affidavits,) that the firſt award had been made by a gentleman long ſince deceaſed, who awarded to the rector of *Kingston* one third of the tithe of *Colville Bridger*'s farm, which that arbitrator conceived to be commenſurate with the farm formerly occupied by *John Monk*, but that that farm in fact conſiſted of 43 acres only, whereas *Colville Bridger*'s farm

 was

was commensurate with the whole parish of *Southwick*. Upon the hearing of the present case it was undisputed, he said, on the evidence, that all the lands, of which the tithes were claimed on either side, lay within the parish of *Southwick*, therefore the Plaintiff's common law right, as rector, to all the tithes thereof, was clear; and if the Defendant, or Mr. *Hooper*, would impugn it, it was for them to shew in certain, to the tithe of what particular land *Hooper* was entitled. Previous to the first award, the rector of *Kingston* had made his claim, as for a portion of tithe; that ground was now abandoned, and the claim now was, that a part of the land was in *Kingston* parish, of which there was no evidence whatsoever. If, as the arbitrator says, it was impossible to specify the lands, of which the tithes belonged to the rector of *Kingston*, the legal consequence was, that the tithe of the whole belonged to the rector of *Southwick*. The award too was bad, on account of the inconvenience of the mode of enjoyment directed, by undivided moieties; neither rector singly can let his tithe; a farmer will not take a lease of one quarter of every lamb, fleece, pigeon, measure of milk, and article of small tithe, nor of every sheaf. This mode was extremely advantageous to the Defendant, who was seized in fee of the soil of both parishes, and the advowson of *Kingston*, and who, obtaining from his own clerk on easy terms a demise of the one fourth, had it in his power to render the other three fourths wholly unproductive to the rector of *Southwick*, for he would give him no more rent than he chose for them, and no other farmer would take a demise of such a property. There was, besides, no ground for awarding so much as one fourth, and if the power of the arbitrator extended to that, it would equally have enabled him to give three fourths, or nineteenths, or to have left the rector of *Southwick* to perform his parochial duty without any

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tithe at all. The arbitrator had alfo departed from his authority, which was, to afcertain what lands were feverally tytheable, meaning to fet out the land feparately and diftinctly. If he might thus make a random fhot, and difpofe of the Plaintiff's property in this manner, there was an end of all right.

MANSFIELD C. J. propofed that the land fhould be valued, and the tithe of one fourth in value allotted to the rector of *Kingston*: but the Plaintiff infifting that the rector of *Kingston* was entitled to nothing at all, the Chief Juftice proceeded to deliver the opinion of the Court. The arguments of the Plaintiff are much more proper to fupport a rule to fet afide the order of reference, than to overthrow this award; but no fuch rule has been applied for, and therefore we are to decide merely whether the arbitrator has exceeded his power. The Plaintiff objects, that *Hooper* is not entitled to the tithe of any fhare of *Southwick* parifh. This matter has been much litigated, and all the perfons who have made awards on it, have been of opinion, that fome of the land lay in *Kingston*. It is faid, (by *Shepherd*, not fworn,) that the poor-rates and other taxes of this land are paid in the like proportion between the two parifhes. Unlefs the parties had obtained a writ of partition, or a commiffion out of chancery, it would be very difficult for any Court before which an action refpecting this matter was tried, to acquire a correct knowledge of this fact, and therefore it has occurred to every Judge who has tried the caufe, that it would be defirable to fubmit the whole to fome diftinterefted and fenfible man, which has been done in this inftance; and the power is couched in very large and unufual terms; the parties, doubtlefs, forefeeing the difficulty there would be in afcertaining the particular lands, empowered the arbitrator to devife all means for avoiding

future

future litigation. The arbitrator ſeems to have made as wiſe and as fit an award as could be made under the circumſtances. There is no evidence before the Court, to ſhew that any injuſtice has been done; there is no impeachment of the conduct of the arbitrator: we therefore ſee no objection to the award, and the

Rule muſt be diſcharged.

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May 16.

An agreement to grant a leaſe contains no implied engagement for general warranty of the land, nor for delivery of an abſtract of the leſſor's title.

THIS was an action upon the caſe. The Plaintiff declared upon an agreement made between the Plaintiff and the Defendant, that the Defendant ſhould grant to the Plaintiff a leaſe of certain ground in *Fleet-Market* for the term of 61 years from *Chriſtmas* then next, under the rent of a pepper corn to *Chriſtmas* then next, and the yearly rent of 54*l.*, clear of all then preſent or future taxes, for the reſidue of the term, and that the Plaintiff ſhould by ſuch leaſe covenant to lay out 1000*l.* in buildings, in three years, and to inſure the premiſes for 1000*l.* at leaſt, in ſome public office, and in caſe of fire to lay out the money recovered in new erections, and that uſual covenants ſhould be inſerted in ſuch leaſe, and that the leaſe ſhould be prepared at the joint expence of the parties: the Plaintiff then averred mutual promiſes of performance, and ſtated, that although he, the Plaintiff, had always been ready and willing, and ſtill was ready and willing to perform the agreement in all things on his part, whereof the Defendant had always had notice, yet the Defendant had not performed the agreement, but had thereby deceived the Plaintiff, in that the Defendant had not made out or ſhewn, nor had he, nor could he have, any ſufficient title or power to grant to the Plaintiff ſuch a

leaſe

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leafe of the faid ground, although he, the Defendant, after the making of the agreement, and after a reafonable time to make out and fhew to the Plaintiff a fufficient right or title to grant fuch leafe as aforefaid had elapfed, was requefted by the Plaintiff to make out and fhew to him fuch a fufficient right and title; but the Defendant had hitherto refufed, and ftill did refufe, contrary to the tenor and effect of the agreement, and of his undertaking. And he further alleged that the Defendant having permitted the Plaintiff to take poffeffion of the ground in expectation of the performance by the Defendant of the agreement, he the Plaintiff afterwards, confiding in the promife of the Defendant, did expend large fums of money in and about the endeavouring to afcertain the right and title of the Defendant to grant fuch leafe, and alfo in and about digging out the foundations of the buildings fo to be erected, and divers other neceffary and proper works for preparing to make and erect fuch buildings, and the purchafing timber and other materials for fuch buildings; and the Plaintiff had alfo been deprived of all the profits, benefits, and advantages which he ought, and might, and otherwife would have derived and acquired from the granting of the leafe. The fecond count ftated the agreement and mutual promifes, as in the firft count, and averred that the Defendant undertook, that he, the Defendant, would procure and deliver to the Plaintiff an abftract of the title to the ground, in due and convenient time, for enabling the Plaintiff to afcertain the right of the Defendant to grant to the Plaintiff fuch a leafe, and averred his readinefs always to accept fuch a leafe, and to perform the agreement on his part; and that although the Plaintiff, after a reafonable time for the delivery to him of an abftract had elapfed, requefted the Defendant to procure and deliver to him fuch an abftract, yet the Defendant did not nor would,

would, in due and convenient time for enabling the Plaintiff to ascertain the right of the Defendant to grant him such a lease of the ground, deliver such abstract, but therein wholly failed and made default, and the Defendant wrongfully neglected to furnish any abstract of title to such ground for a long and unreasonable time, to wit, hitherto. There was also the like allegation of special damage, as in the preceding count. There were also the usual money counts. The Defendant pleaded the general issue. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1810, before *Mansfield* C. J., the evidence was, that the parties had entered into and signed an agreement, "that the Defendant should grant "to the Plaintiff a lease of the ground in *Fleet-market* "for 61 years, from *Christmas* then next, under the "rent of a pepper corn to *Christmas*, and the yearly "rent of 54*l.* clear of all present or future taxes, for "the residue of the term, the Plaintiff to covenant to "lay out 1000*l.* in buildings in three years, to insure "the premises for 1000*l.* at least, in some public office, "and in case of fire, to lay out the money recovered "in new erections. Usual covenants. The lease to "be prepared at the joint expence of the parties." The Plaintiff was forthwith put into possession of the key and ground, and cleared away the rubbish, dug the foundation, and purchased timber and other materials for his intended buildings; but on clearing away the earth, the workmen came down to a foundation of a former building that had stood on part of the same ground which was included in the Defendant's plan, designated in the margin of his conveyance, and which evidently belonged to the owners of the adjoining premises, who were trustees of Bishop *Andrews*'s almshouses, and who, upon learning the circumstance, asserted their claim to part of the ground, being from 12

to

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to 15 feet square at one end, and at the other end about 25 feet in length, the loss of which broke in upon the plan of the Plaintiff's intended building. The Plaintiff, upon this discovery, required an abstract of the title to the premises to be delivered to him, which was not complied with; but the Defendant filed his bill in equity, praying a specific performance, or that the agreement might be cancelled. Upon an interlocutory order, referring it to the Master to enquire whether the Plaintiff in equity could make a good title to the premises, and if he could not to the whole, whether the deficient part was essential to the enjoyment of the premises, the Master reported, that he could not make a good title to any part of the premises, and the Master of the Rolls dismissed the bill, and directed the Plaintiff in equity to deliver up his part of the agreement to be cancelled, His Honour refusing to make any compensation to the Defendant in equity for the expences he had incurred, but giving him liberty to bring any action at law to which he might be advised. The jury found a verdict for the Plaintiff with nominal damages, the Chief Justice reserving to the Defendant liberty to move for a nonsuit, and to the Plaintiff the point whether he was entitled to any thing more than nominal damages; and if the Court should be of opinion that he was, the amount was to be referred to the associate.

Lens Serjt. in *Hilary* term last moved for a rule *nisi* to set aside this verdict and enter a nonsuit, and also for a rule *nisi* to arrest the judgment. *Best* Serjt., on the other hand, moved for a rule *nisi* to increase the damages, by the amount which the Plaintiff had expended in examining and litigating the abstract, clearing the ground, and purchasing materials, and in other expences preparatory or incident to the Plaintiff's intended building. The Court granted all the rules.

Best

Best now shewed cause against the two rules which the Defendant had obtained. As to the first, he contended, that both the agreement laid in the declaration, and the breach of it there alleged, had been proved. The objection, therefore, if any, is on the record, and does not go to a nonsuit. The Plaintiff alleges that the Defendant did not and could not make a title, and he has proved that allegation. As to the second rule, the agreement to grant a lease is equivalent to an absolute covenant for title in a conveyance; therefore it is a breach of such an agreement not to make a title. If this action had not been maintainable, the Master of the Rolls would not have directed it to be brought.

Lens contrà. The Plaintiff ought to have averred a direct breach of the contract to lease, instead of which he pursues this indirect mode of shewing that the Defendant did not keep his contract, because he did not perform these collateral matters. The general issue in assumpsit puts in issue the truth of all the allegations; therefore the Plaintiff was bound to prove, upon his first count, the allegation, that the Plaintiff entered by the Defendant's permission, which is a material allegation; but there was no proof in the cause of any such per mission, therefore the Defendant is entitled to a nonsuit. Whatever loss the Plaintiff sustained, or money he expended, he did it in consequence of his having prematurely taken possession, and for his own gratification. If the lease had been actually granted, it was to be a lease with all usual covenants, and it is an usual covenant in a lease, to covenant for the lessor's title only against himself and all claiming under him, which qualifies the general warranty contained in the words *dedi et concessi*. And though some very cautious persons insert an absolute warranty in leases, yet it is not an usual cove-

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nant; and if it were, neverthelefs a mere agreement for a leafe does not contain by implication the fame warranty.

MANSFIELD C. J. The great conteft in this cafe was, whether the Defendant's permiffion to the Plaintiff, who was in great hafte to enter on the ground and begin building what he intended to build, amounted to any fort of contract to reimburfe him for his lofs fuftained under this permiffion. The Plaintiff could have more directly raifed the queftion whether he was entitled to a leafe containing an abfolute warranty, if he had averred that he applied to the Defendant for a leafe, and that the other refufed it: for a leafe muft neceffarily mean a valid leafe; and if the Defendant had granted him an invalid leafe, or had refufed to grant any, it would have been a breach. Are we to fay that this agreement contains in it a covenant for good title? The Plaintiff might have called on the Defendant for a leafe with all proper covenants, and if he had refufed to admit proper covenants for title, the Plaintiff might have fued for the breach, and might fo have raifed the queftion, what are proper covenants. No reliance can be placed on the circumftance of the Mafter of the Rolls having permitted this action to be brought: he did not draw the declaration, neither do Judges give an opinion upon that which is not before them. The amount of the lofs which the Plaintiff has fuftained is of no avail: it was his own folly to take poffeffion before he had a title. There is no pretence for the motion to increafe the damages: we have difpofed of that. As to the rule for a nonfuit, fuppofe there had been no allegation of permitting the Plaintiff to enter; but that the declaration had ended with the breach of the Defendant's having no title, and iffue had been joined on that breach, and the parties had thereon gone to trial, what

what would have been put in iſſue? The agreement and that breach. You cannot ſay that that breach would not be proved, for there was not a good title; therefore the Defendant muſt be contented with having the judgment arreſted.

LAWRENCE J. The averred agreement to make a good title certainly is not expreſſed in the contract, and as to the agreement alleged in the ſecond count, to deliver an abſtract, it is all poetry, the mere fancy of the ſpecial pleader; there is no trace in the evidence of any ſuch contract. I have always underſtood that in purchaſes of land, the rule is, *caveat emptor*; the extent of the Plaintiff's loſs can make no difference. There may be ground to arreſt judgment upon the record, and there may be alſo ground for a nonſuit. The breach alleged appears to me to be ill alleged, and that is a ground of arreſting the judgment. The iſſue is on the breach. As to the averment of permiſſion to enter, that is a mere allegation of ſpecial damage.

CHAMBRE J. We cannot conſider the agreement as equivalent to a covenant for title in an abſolute conveyance.

Rule abſolute for arreſting the judgment.
Rule for a nonſuit diſcharged; and
Rule to increaſe damages diſcharged.

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May 6.

Doe, on the Demise of Vine and Others, v. Robert Figgins and Robert Sloper.

The Court will not, at the instance of the Defendant in an ejectment, interfere against a Plaintiff who lays a demise by the assignees of a bankrupt without their permission, they having given up the property to the bankrupt, and the Plaintiff claiming under him.

JOHN FIGGINS became a bankrupt in 1801, then possessing a cottage at *Devizes*, demised to *Sloper* at 3*l.* *per annum*, and charged with a debt of 15*l.*; *Vine* and *Baiss* were the bankrupt's assignees, and at a meeting of the commissioners and assignees, held about that time, it was concluded that the cottage would not be worth the expence of a bargain and sale, and therefore the bankrupt was permitted to remain in pernancy of the rents and profits, which during three years his tenant *Sloper*, by his direction, paid to *Dew*, the lender of the 15*l.*, in part liquidation of his debt. During that demise another *Figgins*, the father of the present Defendant, laid claim to the premises, and *Sloper* dying, he got into possession; and after his death, the Defendant, who was uncle to the bankrupt, also took possession. The bankrupt obtained his certificate in 1802, and had since conveyed the premises by lease and release to *Hubbard*, who paid off the 15*l.*, and paid a further consideration. He had brought this ejectment to recover the premises, upon the several demises of, amongst others, the assignees, and the commissioners, and had obtained judgment, execution, and possession.

Best Serjt., upon an affidavit of *Vine*, the assignee, that he did not know of the existence of this property, and that the assignees had never authorized *Westmoreland*, the Plaintiff's attorney, to lay a demise in their names in the ejectment, had obtained a rule *nisi* that all proceedings might be set aside with costs, and that the Plaintiffs, or their attornies, should pay the Defendants their costs, and also pay to Mr. *Stephen Williams*, who had

had been solicitor to the commission against *John Figgins*, and who was the attorney for the Defendant in this action, the costs of this application.

Vaughan Serjt. now shewed cause. He observed that the Defendant's attorney had not ventured to swear that the assignees had now employed him, or authorized him to transfer the use of their supposed rights to the defence of the present action: and he suggested that the contrary was the fact. That even if they had authorized it, there was no ground for the motion; for as the action had succeeded, the assignees were not hurt; there were no costs to which they could be liable, and as the bankrupt and his assigns were equitably entitled to the premises, they had a right to sue in the names of the assignees, upon giving a proper indemnity against costs, which, if demanded, the Plaintiff would have willingly given. *Westmoreland* had sworn he was employed by the real Plaintiff to bring this ejectment, and that he had added the demise by the assignees upon the advice of his special pleader; it was not now competent for the real Defendant to shelter himself from the payment of costs under this contrivance.

Best, *contrà*, contended that the Plaintiff's attorney had acted wrong in using the name of the assignees, (by whose solicitor he, *Best*, was instructed to support this rule,) in order to obtain a judgment, which was to be used adversely to the Defendant, and he suggested that the Defendant was the tenant of the assignees. *Westmoreland* had sworn that his special pleader advised him to obtain the consent of the assignees and commissioners to the laying a demise in their name, and he had not applied for that consent.

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Mansfield C. J. This rule must be considered as obtained at the instance of *Robert Figgins*, the Defendant, not of the assignees. Why should we interfere? No creditor complains. The opinion of the special pleader, that consent should be asked of the assignees and commissioners, (at least of the latter, for the legal estate never was in the former,) was exceedingly proper, because in the event of the Plaintiff's failure, they would have been liable to costs; but the Plaintiff has succeeded, and there are no costs to pay. This is a fine contrivance for defeating the action.

Heath J. *Westmoreland* has exculpated himself. If the ejectment had proceeded on the demise of the assignees only, they might have prevented execution from being sued out; but here are demises by others, therefore the assignees cannot prevent the execution.

Lawrence J. That is an additional reason for discharging this rule.

Rule discharged with costs.

May 8.

Montagu v. Janverin.

The flag officers of a fleet have no right to any share in the gratuity of one half *per cent.*, which is given to the captains of ships of war for carrying public treasure on board their ships, Nor in the freight received by captains for carrying the treasure of individuals. *Semble.* (a)

THIS was an action for money had and received, money paid, and on an account stated, brought to recover one third part of the amount of the freight of dollars, carried by his majesty's sloop *Pluto*, commanded by the Defendant. At the trial before *Mansfield* C. J. and a special jury, at the sittings after *Trinity* term 1810 at *Guildhall*, a verdict was found for the Plaintiff, damages 182*l.* 18*s.* 4*d.*, with liberty for the

(a) See *Brisbane* v. *Dacres*, *post*. *vol.* 5., *Trin. Term* 1813.

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Defendant to move for a new trial, or upon a case to be reserved, as the Defendant might deem most expedient. The substance of the evidence was as follows: The Plaintiff, Admiral *Montagu*, before and at the time of the failing of the *Pluto*, hereinafter mentioned, and thence, until, and after the time of her return, was commander in chief of his majesty's ships and vessels at *Spithead*, and in *Portsmouth Harbour*, from *Beachy Head* to the *Start*, and between *Cape Antibes* and *Cape Barfleur* on the enemy's coast. Previous to *July* 1808, the *Pluto* was put under the command of the Plaintiff, as such commander in chief, and whilst it continued under his command, he received the following letter, addressed to himself, from the under secretary of the admiralty, which was written and transmitted by the orders and authority of the lords commissioners of the admiralty:

Sir, Admiralty office, 15th *July* 1808.

I am commanded by my lords commissioners of the admiralty to signify their direction to you, to order the captain of the *Solebay* to receive on board that ship five hundred thousand dollars, intended for the kingdom of *Leon*, and proceed with the same without loss of time to *Gijon*, and having delivered the same to Mr. *Hunter*, the *British* agent at that place, or his deputy Mr. *Kelly*, to return to *Spithead*, and follow his former orders. If you should be of opinion that the *Solebay* cannot be so long spared from her station, you are in that case to employ the *Pluto* on this service; and you will signify to commissioner *Grey* their lordships' desire, that he should afford every assistance in his power to facilitate the shipment of the money on its arrival at *Portsmouth*.

(Signed) *John Barrow*.

On the receipt of this letter, the *Solebay* having previously left *Spithead*, the Plaintiff sent to the Defendant, then being at *Spithead*, under the command of the Plaintiff, the following order:

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By *George Montagu* Esq., admiral of the white, and commander in chief of his majesty's ships and vessels at *Spithead*, and in *Portsmouth Harbour*, from *Beachy Head* to the *Start*, and between *Cape Antibes* and *Cape Barfleur* on the enemy's coast. Pursuant to directions from the lords commissioners of the admiralty, you are hereby required and directed to receive on board his majesty's sloop *Pluto*, under your command, five hundred thousand dollars intended for the kingdom of *Leon*, and proceed with the same without one moment's delay to *Gijon*; and having delivered the same to Mr. *Hunter*, the *British* agent at that place, or to his deputy Mr. *Kelly*, return to *Spithead*, and follow your former orders.

Given on board the *Royal William*, at *Spithead*, 16th *July* 1808.

To *Richard Janverin* Esq., *Geo. Montagu.*
Commander of his majesty's ship *Pluto.*

By command of the admiral,
W. A. Davies, Ro. Sec.

The Defendant, in pursuance of and under that order of the Plaintiff, received the dollars on board, sailed to, and delivered them at *Gijon*, and returned to *Spithead* under the orders of the Plaintiff. The Defendant, since he performed that service, and before the commencement of this action, received from the Treasury, for the freight of the said dollars, the sum of 548*l.* 9*s.* net, by virtue of the following warrant:

George R.

Our will and pleasure is, that out of any money in your hands that may be imprested to you for this service, you do issue and pay, or cause to be issued and paid, unto our trusty and well beloved *Richard Janverin* Esq., commander of our ship *Pluto*, or to his assigns, the sum of 562*l.* 16*s.*, without deduction and without account, which we are graciously pleased to allow him for freight of specie conveyed by him on board our said

ſhip from *England* to *Gijon*; and this ſhall be, as well to you for making the ſaid payment, as to the commiſſioners for auditing the public accounts, and all others concerned in paſſing your accounts, for allowing the ſame thereupon, a ſufficient warrant. Given at our court at *St. James's*, the 21ſt day of *February* 1801.

By his majeſty's command,
(Signed) *W. Broderick.*
W. S. Bourne.
W. Elliott.

To the paymaſter-general of our guards, garriſons, and land forces.

Captain *Janverin*, 562*l.* 10*s.*, for freight of ſpecie to *Gijon*.

When an order is ſo tranſmitted by the admiralty to an admiral commanding in chief, and in conſequence of that an order is given by him to the captain, the latter acts under the command of the admiral, and not under a ſeparate admiralty order; and the *Pluto* was diſpatched upon the ſaid ſervice by the Plaintiff, and during the whole of it was acting under his orders. It had been the uſage in the navy, previous to the year 1801, when any conſideration was made to the captains of any of his majeſty's ſhips for the freight of private or public money, for the commander in chief, under whoſe orders ſuch captains ſailed, to receive from them one third part of all money paid to ſuch captains for freight; which, if there were more than one flag officer, was divided by the commander in chief in certain proportions between himſelf and the junior flag officers; but if there was no other flag officer, the commander in chief kept the whole. The Plaintiff had no ſuch flag officer under him. In 1801, the allowance, made before that time for the payment of freight for the carriage of public money by ſhips of war, was diſcontinued; and no ſuch allowance was paid from that time till 1807, when the following

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correſpondence on the ſubject paſſed between the ſecretary of the treaſury and the ſecretary of the admiralty.

Sir, · Treaſury chamber, *March* 5, 1807.

The lords commiſſioners of his majeſty's treaſury, having reſumed the ſubject of the allowance of freight, claimed by captains of his majeſty's ſhips, for the conveyance of ſpecie on account of the public ſervice, I am commanded by their lordſhips to acquaint you, for the information of the lords commiſſioners of the admiralty, that upon a careful conſideration of all the circumſtances connected with the ſubject, my lords are of opinion, that it might be expedient, in caſe the lords of the admiralty ſhould ſee no objection to the meaſure, that captains of men of war ſhould have in future, (whenever they ſhall receive any ſpecie on board on account of the public ſervice), a certain fixed moderate allowance, as a compenſation for the care and cuſtody of the ſame; in which caſe, my lords conceive, that one half *per cent.* would be a fair and adequate compenſation, and that no more than one freight ſhould be allowed, even where the money may be tranſhipped before the arrival at the place of its deſtination. If the lords of the admiralty ſhould ſee no objection to the meaſure here propoſed, my lords are alſo of opinion that it would be of great advantage and convenience to the public ſervices, particularly on foreign ſtations, that a general regulation to this effect ſhould be made, and communicated to all admirals and captains of men of war on ſervice. I am therefore commanded to deſire, that you would requeſt of the lords commiſſioners of the admiralty, to have the goodneſs to take the ſubject into their early conſideration, and favour this board with their opinion thereon. I am further commanded to ſay, that if it ſhould appear to the lords of the admiralty, that the regulation here propoſed would be injurious to the ſervice of the navy,

or

or objectionable in any other respect, it seems to this board that it would be for the good of his majesty's service, that the most positive instructions should, in that case, be given to all admirals and captains of men of war, employed on foreign stations, to receive specie on board their respective ships, when required so to do by any public officer in his majesty's service, to sign receipts for the same, and to deliver it at the place of its destination, (whenever the same can be done without prejudice to the particular service in which such admiral or captain shall be at the time employed,) without any charge whatever for freight, or without their being allowed to claim, detain, or receive any part of the said specie, as a compensation for their care and trouble, or under any other pretence whatever. Their lordships are the more anxious that this point should now be finally settled, as well on account of the great security, as well as facility, that is given to his majesty's service on foreign stations by the ready conveyance of specie on board his majesty's ships, as because it appears from the accounts of some of his majesty's commissaries abroad, transmitted to the commissioners for auditing public accounts for examination, that since the regulations were made, by which, in compliance with what was the opinion of this board, all commissaries were forbidden to make any allowance whatever to captains of men of war for the conveyance of specie, sums are not unfrequently charged in such accounts as having been detained by the several captains having charge of such specie, under the pretence of *a right founded upon ancient usage*, to a charge, in the nature of a poundage on the sum shipped, for their care and trouble during the time that such specie was on board; whilst, on the other hand, it is asserted by the commissioners, that the captains have in most cases refused to give any receipt for the amount of the specie they have taken on board;

 both

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both of which practices are wholly inconsistent with the regularity and correctness in accounts which the board requires from its commissaries abroad, as well as from all other persons employed in the receipt and expenditure of the public money. I am further to request the lords of the admiralty will please to communicate to this board whatever regulations they may think proper to make on this occasion, that my lords may give instructions accordingly to their commissaries and other officers having charge of any public money on foreign service.

I am, &c.

Geo. Harrison.

Sir, Admiralty office, 10th *March* 1807.

My lords commissioners of the admiralty having taken into their consideration the suggestions contained in your letter of the 6th instant, upon the subject of a certain allowance of one half *per cent.* proposed to be made to the commanding officers of men of war, for the care and custody of specie entrusted to them on account of the public service, command me to acquaint you, for the information of the lords commissioners of his majesty's treasury, that their lordships are of opinion that no naval officer can have any right or claim to demand any pecuniary compensation for the freight of any article whatever, which is put on board any of his majesty's ships of war, for any objects of public service; and that it is the duty of every naval officer to execute such orders as are given to him by persons authorized so to do, without any claim of freight, either for specie, or for any other article whatever. That nevertheless, if, in consideration of what his majesty has frequently been pleased to allow as an indulgence on similar occasions, his majesty should now be graciously disposed to direct that the allowance of one half *per cent.* shall be paid to the commanding officer who is entrusted with the carriage of specie for the public service, the officers of the

navy

navy will undoubtedly receive with due gratitude and acknowledgment any ſuch mark of his majeſty's grace and favour; and their lordſhips will, upon any ſuch notification of his majeſty's pleaſure, give the neceſſary directions for carrying this regulation into effect, agreeably to the ſuggeſtions contained in the communication from the lords commiſſioners of the treaſury. 1811. MONTAGU v. JANVERIN.

I am, &c.

To *Geo. Harriſon* Eſq. *B. Tucker.*

Soon after, the following order was iſſued by the lords of the admiralty:

By the commiſſioners for executing the office of lord high admiral of the united kingdom of *Great Britain* and *Ireland*, &c. The lords commiſſioners of his majeſty's treaſury having ſignified to us their opinion, that a gratification ſhould be allowed to the captains and commanders of his majeſty's ſhips and veſſels, for the freight of all public monies that ſhall be conveyed on board his majeſty's ſhips, at the rate of one half *per cent.*, ſuch allowance to be made once only for every ſuch ſum of money, however often it may have been tranſhipped before it may have reached its original deſtination; we do therefore hereby direct, that all officers charged with the tranſport of public money, ſhall, upon its delivery to the perſons authorized to receive it, obtain a certificate of having ſo done; which certificate is to be tranſmitted to the lords commiſſioners of his majeſty's treaſury, who, upon due notice of the arrival of the money at the place of its deſtination, will then direct payment to be made, at the rate of 10*s.* for every 100*l.* ſterling, for the whole paſſage of the money, from its firſt embarkation to its arrival at the place of its deſtination; and all officers who may be employed on this ſervice, are hereby required and enjoined not to detain or withhold, on any pretence

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whatsoever, any part of the public money so entrusted to their charge.

To the respective captains and commanders of his majesty's ships and vessels.

Since making of which order, the captains of his majesty's navy have constantly received the allowance mentioned in it for conveying public money, and, according to the usage, have been required to pay, and have paid, one third thereof to the commander in chief under whose command they were; but the Defendant having refused, upon the application of the Plaintiff to him for one third of the said money received by him for the said freight, to pay the same, the present action was brought to recover it.

Best Serjt., for the Defendant, in *Michaelmas* term 1810, accordingly moved for a new trial, upon which occasion *Mansfield* C. J. observed, that "it was easy to understand how such an usage had arisen. The admiral is commander of every ship in his squadron. The articles of war prohibit the captain of a ship of war from taking on board and carrying any merchants' goods whatever, except bullion; but that he may carry. As to bullion, however, the captain is so completely under the control of the admiral, that the admiral has it in his power to say, "if you do not allow me this proportion "out of the freight, you shall not carry the treasure." If the captain takes on board merchants' bullion, he signs a bill of lading for it, like the captain of a merchant ship, by which he incurs a dreadful responsibility, and is therefore well entitled to freight from the merchant. In carrying government money, at least in the present case, the captain is under no obligation to the admiral; he receives his orders immediately from those who have a right to command his services, the government

ment of the country; and I ſhould think that the compenſation he receives, would make him reſponſible to government if the bullion ſhould be loſt by his miſtake. Theſe are reaſons why he ſhould retain the whole freight for his own benefit. When a fleet is abroad, the employment of every ſhip is, of courſe, under the admiral's direction; no ſhip can take ſpecie on board without his orders, and if he may ſelect ſhips to carry ſpecie, or employ them in that ſervice at his pleaſure, it may ſometimes happen to be a temptation to an admiral to employ his ſhips in a ſervice leſs beneficial to the nation at large, than that to which they were deſtined by the admiralty; whereas the admiral's only guiding motive ought to be the public ſervice. Nothing, however, was ſaid at the trial upon the propriety or impropriety, or illegality of ſuch an uſage." He alſo obſerved that "it made no difference whether the ſhip were ſelected ſolely by the admiralty, or nominated by the port admiral out of two ſelected by the admiralty."

The Court granted a rule to ſhew cauſe why a new trial ſhould not be had.

Upon a ſubſequent day in the ſame term, *Shepherd* Serjt., for the Plaintiff, would have ſhewn cauſe againſt the rule; but the parties having omitted to furniſh to the Court copies of the neceſſary documents, they would not then hear it argued, and ſuggeſted that it might more conveniently be turned into a ſpecial caſe; which was accordingly done in the ſame term, in which the evidence is above ſtated; whereon the queſtion reſerved for the conſideration of the Court, was, whether the Plaintiff was entitled to recover. If he was, the verdict was to ſtand: if not, a nonſuit was to be entered. The caſe was argued on this day, when

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Shepherd Serjt. for the Plaintiff, admitted, that there was no written law, by which admirals were entitled to claim a proportion of the freight paid to the captain for carrying either public or private treasure. The claim rested wholly on the practice of the navy. But it had been recognized in courts of justice; for in an action, in which he was himself of counsel, brought in 1801 by Sir *Wm. Parker*, then the junior flag officer on the *American* station, against Mr. *Tucker*, the agent of Lord *St. Vincent*, to recover his proportion of the one third part of the freight, which Lord *St. Vincent*, then commander in chief on that station, had received from a captain who had carried some bullion, the Plaintiff succeeded. Many admirals were called as witnesses on that trial, who spoke to their own practice, and to that of old admirals then dead; and they even carried it back so far as the time of Sir *George Rooke*, and the Plaintiff in that case recovered, merely on the ground of the universal practice of the navy. Unless the Plaintiff had been entitled upon the general law to recover, he could not have succeeded in that case, for Lord *St. Vincent* had received the whole amount, and the claim was not founded on any alleged agreement between the parties. In the case of *Donelly* v. *Popham*, *ante* vol. i. p. 1., it was admitted, that if Sir *Home Popham* was a flag officer, he had a right to recover one third part of the sum which Captain *Donelly* had received for the freight of the treasure brought home in the *Narcissus*. [*Mansfield* C. J. observed that in that case there was no dispute about the custom.] The Plaintiff there did not bring the custom into dispute, but it was taken for granted, that the flag officer, if there had been one, had a right to share the freight. If, then, there were such a custom formerly, can the cessation of the practice of paying freight to the captains, and the subsequent order renewing it, make any alteration? It seems, that when captains

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captains had carried treasure for the public, an idea had prevailed among them that they had a lien on the money; and it had been their practice to detain a part of it, by way of paying themselves the freight; which certainly was an illegal act for them to do, unless they had received permission for it from the government. This practice is alluded to and forbidden, in Mr. *Harrison*'s letter of the 5th *May* 1807. But the captains universally received the freight themselves, and paid over a proportion of it to the admirals: no part of it was ever paid by government to the admirals in the first instance. And although the language of the new orders is, that "the allowance shall be made to the captains and commanders of his majesty's ships and vessels," yet the orders rather contemplate that the money shall be paid to the persons entitled to it, than designate who those persons are. For the duty of obtaining and transmitting the certificate, and the prohibition of not retaining any part of the money, are expressly laid on "all officers charged with the public money, and who may be employed on this service." Who then are they? The expression must be construed in the same way as the prize proclamations, which give a share of the prize money to the flag officers "directing and assisting in the capture;" that is, it must include the admirals under whose command the ship bearing the treasure is dispatched. The Plaintiff therefore was as much employed in this service, as the Defendant, and is as much entitled to his proportion of the freight. If he be not entitled to receive his proportion from the captain, the case of *Parker* v. *Tucker*, cannot be law; for the right of a junior admiral to receive his proportion of the third part from the senior admiral, must rest on the same principle.

Best

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Best Serjt., who was to have argued the case on behalf of the Defendant, was stopped by the Court.

MANSFIELD C. J. delivered the judgment. This was a point very fit to be decided. In the first place, it is difficult to conceive how there can be a custom to divide money given by way of bounty. For this money, paid to the captains as a gratuity for carrying bullion, is a gratuity, which they have no right to demand; it is paying them for that which they are bound to do without any gratuity. For the commander of every king's ship is bound to perform that, and every other service she is put upon. The gratuity used to be one *per cent.*, and is now one half *per cent.*, but for six or seven years, nothing was paid at all. The captains, during that period, had no right to any thing: of course, during the same period, admirals had no right to any thing. In carrying public money, the same thing would not happen, as in the case of carrying the bullion of private persons; there would not be the same temptation to give one captain a preference over another, because the government probably selects the captain who shall have the charge of the treasure. There was some variance in the evidence, as to whether the custom extended to public money, or to private money only. There could be no custom as to the amount paid for carrying bullion for private persons; for the amount of freight of private treasure must depend on the contract made in each case; but some of the admirals who were examined at the trial, stated that it was a practice to dispatch ships away from the fleet, and away from the station upon which they were employed, to a distinct place, for the purpose of carrying private bullion. It struck me that this would be a very dangerous practice; for an admiral ought to employ the ships solely with a view to the public service; but this would be a perpetual temptation

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to admirals to forget their duty, and inſtead of employing ſhips in the ſervice moſt uſeful to the public, to ſend them upon this ſervice, in which the admirals could find their private emolument. It is not at all wonderful, that when ſuch a practice had crept in, it ſhould continue: for it muſt be very much a captain's intereſt to obtain the favour of his admiral; and therefore he would not venture to conteſt the right inſiſted on. The legality of the cuſtom has never been diſcuſſed in any of the caſes which have ariſen. In the caſe of *Parker* v. *Tucker*, both parties inſiſted on the cuſtom; both agreed that a ſhare was to be taken from the captain, for the benefit of one or more admirals, and the only queſtion was, wherher it was for the benefit of one or of both. In the caſe of *Donelly* v. *Popham*, both parties acquieſced in the cuſtom. Captain *Donelly* did not mean to quarrel with the whole body of admirals, which he muſt have done, if he had diſputed the legality of the cuſtom. But it was ſufficient for him to ſhew that the commodore was not a flag officer, not being authorized by the admiralty to have a captain under him, and therefore, on that ground, not entitled to a ſhare in the freight. It ſeems to me quite impoſſible that ſuch a cuſtom ſhould exiſt in law, or that the practice ſhould be known to the lords of the admiralty. If they had approved the practice, they would have noticed it when they made the order for the new allowance of freight. What has been ſaid reſpecting the impropriety of detaching ſhips from their ſtations with bullion, muſt not be underſtood as applicable to the preſent caſe, becauſe this treaſure was ordered by the higher powers to be carried on board the *Pluto*, and not by the admiral, who is, in this inſtance, only the inſtrument to execute their orders.

The reſt of the Court concurring,

Rule abſolute to enter a nonſuit.

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May 8.

Oliver, Esq. v. Lord W. C. Bentinck.

Plea justifying a libel, which stated the grounds on which the Plaintiff was dismissed the *East India* Company's service, on the ground that the Company ordered the Defendant, as Governor in Council, to dismiss the Plaintiff for the reasons assigned: the plea does not shew a sufficient justification for publishing the causes of dismissal.

THE Plaintiff declared that he had been a good subject, and had been colonel of a certain regiment in the service of the *East India* Company, and had been and was retained and employed by, and in the service of, the Company, as commanding officer of the *Molucca Islands*, and as such colonel and commanding officer had always conducted himself with great integrity, fidelity, and honour, and never was guilty, or until the publishing of the libels after-mentioned, suspected to have been guilty of any misconduct or violation of the trust reposed in him as such commanding officer, or otherwise; and that the Defendant, maliciously intending to injure the Plaintiff in his good name, &c., and to cause it to be suspected and believed, that the Plaintiff had been and was guilty of a gross violation of the trust reposed in him as such commanding officer, at *Fort St. George* in the *East Indies*, (to wit) at *Westminster*, the Defendant then and there being governor of *Madras* and its dependencies, falsely and maliciously did publish and cause to be published concerning the Plaintiff, and concerning his conduct as such commanding officer, and concerning the Court of Directors of the Company, a certain false, scandalous, malicious, and defamatory libel, dated *Fort St. George*, 1st *July* 1807, concerning the Plaintiff, viz. The Honorable the Court of Directors having resolved to dismiss Colonel *J. Oliver* of this establishment, from the service of the Honorable Company, for gross violation of the trust reposed in him as commanding officer of the *Molucca Islands*, the Right Honorable the Governor in Council directs, that the name of Colonel *J. Oliver* be erased from the army list of this presidency, from the 20th *June* last, being the date of the receipt of the orders of the Honor-

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Honorable Court at *Fort St. George*, by order of the Right Honorable the Governor in Council, (signed) *G. Strachey*, secretary to government. The Defendant pleaded first, not guilty; 2dly, that before the publishing and causing to be published the supposed libel, to wit, on the 10th day of *February* 1807, at *Westminster*, the Court of Directors of the *East India* Company did resolve to dismiss the Plaintiff from the service of the Company, for a gross violation of the trust reposed in him as commanding officer of the *Molucca Islands*, and did then and there order the Governor in Council of *Fort St. George*, on the receipt of that order, to erase the name of the Plaintiff from the army list of the presidency; and that afterwards, to wit, on the 20th day of *June* 1807, at *Fort St. George* aforesaid, to wit, at *Westminster*, he the Defendant, then and there being the Governor of *Fort St. George*, did receive the said order of the Court of Directors; wherefore he the Defendant afterwards, to wit, on the 1st day of *July* in the said year 1807, at *Fort St. George*, to wit, at *Westminster*, then and there being such Governor, in the discharge of his duty and office as such Governor, did publish and cause to be published the supposed libel, as it was lawful, &c. He, thirdly, pleaded, that before the publishing the supposed libel, the Court of Directors of the *East India* Company, by a certain public official dispatch duly made and sent from the Court of Directors to the Governor and Council of *Fort St. George*, did inform the Governor and Council, that the Court of Directors had resolved to dismiss the Plaintiff from the service of the said Company for a gross violation of the trust reposed in him as commanding officer of the said *Molucca Islands*, and did by that dispatch order the Governor and Council of *Fort St. George* on the receipt of that order to erase the name of the Plaintiff from the army list of that presidency; and that afterwards the Defendant, then and there being the Governor of *Fort St.*

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St. George, did receive the said dispatch of the Court of Directors. Wherefore he, the Defendant, afterwards, then and there being such Governor, and as such Governor, in the discharge of his duty and office as such Governor, did publish the supposed libel, as it was lawful for him to do. The Plaintiff joined issue on the first plea; and to the second replied, *de injuriâ suâ propriâ*; and to the third he replied, protesting that that plea was wholly insufficient in law, that he, the Plaintiff, before the publishing the libel, had not been guilty of a gross or other violation of the trust reposed in him, the Plaintiff, as commanding officer of the *Molucca* islands. The Defendant joined issue on the second plea, and demurred to the replication to the third plea; and the Plaintiff joined in demurrer.

Best Serjt., on behalf of the Defendant, contended, that as well the declaration, as the replication to the third plea, were open to his demurrer. There is no more ground for maintaining this action, than if the commander in chief in this country were to promulgate any order of his majesty, dismissing an officer from the service, there would be for maintaining an action against the commander in chief and the printer of the *Gazette*. At all events, if the Defendant does not set out his authority with sufficient precision, it is only cause of special demurrer to the plea.

Pell Serjt., in support of the plea, admitted that he did not impugn the right of the court of directors, or of the governor, to dismiss the military officers of the Company, but that the Defendant ought not thus openly to have published a reason for the dismissal, which was not founded in fact; the plea assigns no ground to warrant this; the Defendant avers that the court of directors enjoined him to dismiss the Plaintiff, and therefore he

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he publiſhed the cauſe of his diſmiſſal: he does not ſay that the directors enjoined him to publiſh the cauſe. If his majeſty were to diſmiſs an officer without bringing him to a court martial, it would not follow that the reaſons of it ſhould be publiſhed.

MANSFIELD C. J. How ſhould an officer in *India* know why he was diſmiſſed, if the reaſon aſſigned is not to be made known. If the court of directors were peremptorily to diſmiſs him without aſſigning a reaſon, that would be a greater hardſhip on the defendant. If he had a time for coming to an explanation with his employers, there might be ſome reaſon to conceal the grounds of his diſmiſſal till after that explanation had taken place; but juſtice to the Plaintiff requires that it ſhould thus be publiſhed. The libel is in fact a recital of the effect of the authority under which the Defendant acts, and it would be a monſtrous thing if the court of directors were to diſmiſs an officer without aſſigning a reaſon. One ſhould be very ſorry to have any thing like a judgment in favour of a Plaintiff in ſuch an action as this, than which a more fooliſh or a more miſchievous one cannot eaſily be imagined: it is much better for the Company, for the country, and for the Plaintiff himſelf, that the cauſe of his diſmiſſal ſhould be ſtated, than that it ſhould be ſuppoſed that the *Eaſt India* Company did it *ſuo arbitrio*.

HEATH J. It is the conſtant practice here, at home, that when a delinquent guilty of ſome enormity has been brought to a court martial, the commander in chief has directed the ſentence to be read at the head of every regiment.

LAWRENCE J. I ſuppoſe the Plaintiff's object was, to try before a jury, the circumſtances of this gentle-

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man's conduct, by a queſtion to be raiſed on this record; that could never be permitted in this form. But the plea is certainly defective; for the order is iſſued to the governor and council, and it is not ſhewn that what the Defendant did, he did as governor in council, he only pleads that he did it as governor, and does not ſhew how it became his duty to do this in his individual capacity as governor. There is a ſufficient libel ſtated on the declaration to ſuſtain that: ſuppoſe the Defendant had received no ſuch diſpatch from the Company, could he have warranted ſuch a publication in that caſe?

CHAMBRE J. The only doubt I have on the ſubject is, that the plea does not ſtate on what account it became an act in the execution of the Defendant's duty to publiſh this. Can we ſuppoſe that he had a right to publiſh it in hand-bills and newſpapers? The only authority he ſhews, is for eraſing the name from the army liſt, not for the publication.

The Court permitted the Defendant to amend.

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MILLER v. ROBE and Another.

May 9.

If arbitrators award an exceffive fum to be paid to themfelves, the Court will refer it to the prothonotary to reduce it.

It is competent to arbitrators to inquire whether a ranfom, for which the Plaintiff feeks to be repaid, were juftified by an extreme neceffity within the ftature 45 G 3. c. 72. f. 16., which enables a court of admiralty to allow fuch neceffity.

BEST Serjt. had obtained a rule to fet afide the award of three merchants, upon two grounds; firft, that they had awarded that the Defendants fhould give to the Plaintiff who was the captain of a fhip, a bond of indemnity againft a bill of exchange, which the Plaintiff had given for the ranfom of his veffel, the *Friendfhip*, of which the Defendants were owners, contrary, as was contended, to the enactments of the ftatute 45 *Geo.* 3. *c.* 72. *f.* 16.; fecondly, that the arbitrators had awarded 180*l.* to themfelves for making the award.

Shepherd Serjt. fhewed caufe againft the firft objection, upon the ground that the Plaintiff, who had not furrendered his veffel, but after a moft gallant action with two *French* privateers of fuperior force, had ranfomed her in a cafe of extreme neceffity, to be approved of by the court of admiralty, which was legalized by the fame fection, and that the veffel being libelled in the court of *Jamaica*, as confifcated, on account of this ranfom, he had pleaded the extreme neceffity, and obtained an interlocutory judgment determining that fact in his favour; and that the inftrument recording that judgment and giving all cofts to the Plaintiff was exhibited before the arbitrators, who muft be prefumed to have found the fact of neceffity. As to the fecond objection, that the accounts fubmitted to the arbitrators were very long, and deferved a large fee;

The Court difcharged the rule as to all except the fum of 180*l.*, and as to that, directed the prothonotary to enquire what was a reafonable fum to pay the arbitrators for making their award, and that the fum fhould be reduced accordingly.

Beft was heard in fupport of his rule.

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May 10.

HORNE, Demandant; LODGE, Tenant; PRESTON, Vouchee.

The Court permitted a recovery to be amended by inserting an advowson, which had passed by the general word hereditaments, but refused to insert a curacy, because the right of nominating a perpetual curate was incident to and parcel of the rectory.

ISAAC *Preston* Esq.,* formerly of *Beeston St. Lawrence*, being seized of the manor of *Beeston*, and of divers farms in *Beeston*, *Ashmenhaugh*, and adjoining parishes, and also of the advowson of *Beeston*, and curacy of *Ashmenhaugh*, in the county of *Norfolk*, by his will, after reciting that he was seized of certain contingent remainders in fee, and reversionary estates in the several manors, messuages, lands, tenements, and hereditaments by him already, (as he thought,) settled on his son *Jacob*, and the heirs male of his body, either by the marriage settlement of his mother, or any voluntary or other settlements, to prevent as far he could, any dispute concerning the same, devised "all and every his "manors, messuages, lands, tenements, and heredita-"ments in the said towns, or elsewhere in the kingdom "of *England*, to his son *Jacob Preston*, and the heirs "male of his body, and for want of such issue male, "to the heirs male of his (the testator's) body." *Isaac Preston* died in 1768. *Isaac Preston* and *Jacob Preston* respectively presented to the living of *Beeston*, and also nominated to the curacy of *Ashmenhaugh*. In 1772, *Jacob Preston*, in order to make a tenant to the precipe, conveyed, (*inter alia*), so much of his manor of *Beeston* as was freehold or charterhold, and "all others his "manors, messuages, lands, tenements, and heredita-"ments in *Beeston St. Lawrence*, *Ashmenhaugh*, *Neates-"head*, &c. &c., to *Lodge*," and declared the uses to himself in fee. The recovery was duly suffered. *Jacob Preston* by his will devised "*all his manors, mes-"suages, lands, tenements, and hereditaments to his sisters "for life, and their issue male.*"

Shepherd

Shepherd Serjt. now moved on behalf of the devifees of *Jacob Prefton*, to amend the recovery, by inferting the words, "*Adowfon of Beefton St. Lawrence, and curacy of* "*Afhmenhaugh*," on the ground that the fame paffed to the tenant of the precipe under the word hereditaments in the deed of 1772 to lead the ufes, upon an affidavit that it was believed they were intended to pafs. A letter from *Jacob Prefton*, dated *November* 1771, to his then folicitor, was alfo verified by affidavit, from which it appeared that he had given inftructions for fuffering a recovery and for vefting in himfelf in fee, not only the eftates mentioned in his mother's marriage fettlement, but alfo all the reft of the *Beefton* eftate. *Milbank* v. *Jolliffe*, 2 *Bof. & Pull.* 580. *n.* was cited, where the right of patronage to the curacy was exprefsly inferted as well as to the rectory.

MANSFIELD C. J. You may infert the advowfon of *Beefton*, but as to the right of nominating a perpetual curate to *Afhmenhaugh*, how can that be the fubject of a recovery? You cannot infert that; it is a thing unknown to the law; it is, where a layman is rector, as the Duke of *Portland*, for inftance, is rector in *Marybone*, and appoints (as he is bound to do) a curate.

HEATH J. The right to nominate a perpetual curate, is parcel of the rectory.

Shepherd Serjt. We will give no trouble on that point, but infert the advowfon only.

Rule abfolute.

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DICK v. NORRISH.

The Plaintiff falsifying the Defendant's affidavit to change the venue, the venue was retained, though the Plaintiff could not undertake to give material evidence in *London*, where he had laid it, either venue being inconvenient to one or other of the parties.

IN this action a rule had been obtained by *Lens* Serjt. for changing the venue from *London* to *Hampshire*, upon the usual affidavits that the cause of action arose wholly in *Hampshire*, and not elsewhere.

Best Serjt. now shewed cause upon affidavits, stating that the action was brought for maliciously suing out a commission of bankrupt, which necessarily issued in *Middlesex*, and so falsifying the Defendant's affidavit on which the rule was made; but the Plaintiff, although his witnesses all resided in town, and many of them were clerks in public offices, who could not be carried down to *Winchester* to give evidence without great expence to the Plaintiff and inconvenience to the public, was nevertheless unable to give the usual undertaking to give material evidence in *London*, though he could have done it in *Middlesex*. It was further sworn on behalf of the Defendant, that all his witnesses resided in *Hampshire*, and that it would be expensive and inconvenient to him and them to try the action in *London*.

Lens Serjt. endeavoured to support his motion, neither party being able to comply with the usual requisitions of the Court in the case of venue, and, under circumstances of mutual inconvenience, the rule which had been obtained must prevail. In the case of *Holmes* v. *Wainwright*, 3 *East*, 329., the Court of King's Bench in a similar action made the rule absolute.

MANSFIELD C. J. The Plaintiff cannot legally and truly swear, according to legal apprehension, that the whole cause of action arose in *Southampton*, because a material

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material part arose in *Middlesex*; and it is a question whether we can change the venue, when there is a material inconvenience on both sides; on the one side there would be a material inconvenience in changing the venue, by carrying down witnesses from town, and there would be inconvenience on the other side by bringing witnesses hither: we therefore cannot change the venue. I do not know whether we can now make any rule on the subject, but it would be a very good rule, if, with respect to all other counties in the kingdom, *London* and *Middlesex* were to be considered as the same.

Rule discharged.

BARBER v. BARBER and Another.

May 11.

The rule of court, *Michaelmas* 42 *G.* 3., does not require the consideration of a judgment to be indorsed on the warrant of attorney.

If a warrant of attorney be given to confess judgment absolutely for a certain sum, although it be understood between the parties that it is given only to indemnify the Plaintiff against his suretyship for a smaller sum, that is not such a defeazance as needs to be indorsed on the warrant of attorney. And the Plaintiff needs not to defer execution till the contingency happens.

LENS Serjt. had obtained a rule *nisi* to set aside the judgment which had been entered up on the Defendant's warrant of attorney, and the several writs of execution, and to restore the goods and money that had been levied, upon the ground that there was no defeazance written on the back of the warrant of attorney, as required by the rule of Court of *Michaelmas* term 42 *G.* 3.

Shepherd and *Best* Serjts. now shewed cause, contending that no defeazance was required under the circumstances of the present case, which were as follow. The Defendants, who were traders, in *December* 1809, compounded with their creditors for 15*s.* 6*d.* in the pound,

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out of which the Plaintiff agreed to guarantee to the creditors the third inſtalment, conſiſting of 4*s.* in the pound, and amounting to 5152*l.* 6*s.* 2*d.*, for which amount he accepted bills drawn by the Defendants in favour of or for the benefit of the reſpective creditors, which would fall due on the 22d of *April* 1811. Thereupon the Defendants gave him, on the 7th of *February* 1810, a warrant to confeſs judgment in debt for *money borrowed* for 10,000*l.*, upon which warrant there was no defeazance indorſed. The Defendants had alſo, about a fortnight before the date of the warrant of attorney, aſſigned to the Plaintiff a debt of 2000*l.* due to them from *Clarance*, and given him a bill of exchange for 5000*l.*, drawn by the Plaintiff and accepted by the Defendants, dated 27th *December* 1809, and payable one month after date. It was ſworn by the Defendants, and had been admitted by the Plaintiff at a meeting of the creditors of the Defendants, that the aſſignment of the debt, bill of exchange, and warrant of attorney, were all intended merely for the purpoſe of indemnifying the Plaintiff againſt his acceptances of the 5152*l.* 6*s.* 2*d.*, and that there had been no money borrowed, or other conſideration; the Plaintiff contended that they were alſo given for the purpoſe of enabling him to provide for the diſcharge of thoſe bills. But no other ſecurity, agreement, deed, or declaration, was prepared or ſigned by either party. It appeared that the bill of exchange for 5000*l.*, the amount of which required a 20*s.* ſtamp, was made on a 10*s.* ſtamp only, and therefore was void. The Plaintiff ſigned judgment on the 5th of *April* 1810 for 10,000*l.* debt, and 40*s.* coſts. The Defendants having again become embarraſſed, the Plaintiff, without any previous demand of money, or other communication with them upon the ſubject, on the 11th *January* 1811, iſſued writs of *fieri facias*, directed to the ſheriffs of *London* and *Surrey*, indorſed

dorsed to levy 5152*l.* 6*s.* 2*d.*, besides poundage, under which executions the Defendants goods were seised, and upon the Defendants having been declared bankrupts, were sold. After execution levied, the Plaintiff paid his acceptances when they became due. *Shepherd* contended, first, that the giving the bill of exchange, which was a collateral security, not the consideration of the judgment, upon a wrong stamp, could not affect the judgment. If a Plaintiff were to levy execution under a judgment given without any consideration at all, or if this Plaintiff had levied to a greater extent than his own liability on his acceptances, the Court would restrain him, not indeed with reference to the rule of Court relied on, which does not apply to such a case, but because it would be an abuse of the authority of the Court; but the inadequacy of the consideration, or the total want of consideration, would not make a judgment void at law. This rule of Court applies only to cases where the judgment is not to be entered up absolutely, but only in certain contingencies; but in this case there was no agreement made restraining the use to be made of this judgment; it was given for the very purpose that the Plaintiff might, by sale of the Defendants' goods, and out of the proceeds, raise money to discharge his own liability.

Lens and *Vaughan* Serjts. *contrà.* This warrant of attorney is, from the nature of the transaction, subject to a defeazance, namely, that if the Defendants should take up the bills accepted by the Plaintiff, he should not enter up judgment. It was never intended that the money should be levied in all events. The debt, too, when it should be incurred, only by a little exceeded 5000*l.*; the judgment was for 10,000*l.*; the disparity shews it was intended to be defeazable on payment of the bills, and therefore the Plaintiff was bound to wait until

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until he ſaw whether the Defendants would pay the bills or not, before he could enforce his judgment, and there was a tacit defeazance on payment of the 5152*l.* 6*s.* 2*d.*

MANSFIELD C. J. Could it be ſaid that the Plaintiff was not at liberty, on this warrant of attorney, to enter up judgment the next hour after it was given? The Plaintiff's paying the bills, in caſe the Defendants ſhould not provide for them, was the conſideration of the warrant of attorney, but it does not follow that the converſe ſhould be a defeazance of it. It may not be improper ſo to enlarge the terms of this rule of Court, as that in future the conſideration, as well as the terms of defeazance of every warrant of attorney, ſhould be expreſſed on the back thereof, but the rule is not now ſo. The circumſtance which has happened ſhews the neceſſity of the Plaintiff's taking ſuch a ſecurity; for he gave the acceptances to ſave his brothers from bankruptcy; he was conſcious that he was abſolutely liable to the payment of the 5152*l.* on the bills; the creditors might ſue out a commiſſion, and therefore it was neceſſary he ſhould be prepared with his judgment, that if he ſhould hear any rumour of ſuch an intention, he might ſue out execution inſtantly. It is impoſſible to ſay this was a defeazance. There is no fraud on the creditors, nothing diſhoneſt, nothing wicked, nothing imprudent. If the Plaintiff had levied more than the amount of the bills he had paid, the Court would ſet aſide the execution as to the ſurplus; but there is no reaſon here why we ſhould deprive the Plaintiff of the advantage he has got at law.

Rule diſcharged.

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ANONYMOUS.

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An affidavit having only one ſtamp cannot be uſed in more than one cauſe.

IN four cauſes the affidavits were each of them entitled in all the four, but there was only one ſtamp on each affidavit.

Beſt Serjt. objected that they could not be read, becauſe no indictment for perjury could be ſuſtained on them for want of ſufficient ſtamps to enable them to be given in evidence.

The Court held the objection fatal, but permitted *Clayton* Serjt., who was oppoſed to him, to amend by ſtriking out three of the names, and forthwith reſwearing the affidavits in the fourth cauſe, which made them good affidavits in that cauſe.

BIRCH and Others *v.* STEPHENSON and Others.

May 11.

Reſervation of 5*l. per* acre during the laſt 20 years of a term for every acre of meadow thereby demiſed, which the tenant ſhould plough, dig, ear, break up, or convert into tillage during the ſaid laſt 20 years of the term, and ſo after that rate for any greater or leſs quantity than an acre, or leſs term than a year. The rent is due in the laſt 20 years if the land is then ploughed, whether it was firſt ploughed within the laſt 20 years or before, and the rent continues payable during the 20 years, though the land be again laid down to permanent graſs.

Land ſown to clovers with corn is not thereby reſtored to a ſtate of permanent paſture, but is ſtill in tillage.

If a leaſe deſcribe demiſed land as meadow land, no other evidence is neceſſary to prove that it was meadow land at the commencement of the term.

COVENANT. The declaration ſtated that Lord *Colerane*, being ſeized in fee, by indenture of 19th *July* 1728, demiſed to *Ralph Harwood*, his executors, adminiſtrators, and aſſigns, amongſt other premiſes, all thoſe three pieces or parcels of *meadow ground* com-

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monly called or known by the name of *Hawke's parks*, formerly woodland, with the appurtenances, lying in the parish of *Tottenham*, (except as therein is excepted), to hold the same (except as thereinbefore excepted) unto *Harwood*, his executors, administrators, and assigns, from the feast of the *Annunciation* then last past, for the term of 98 years, under the yearly rent of 304*l.* on the four feasts of *St. John the Baptist*, *Michaelmas*, *Christmas*, and the *Annunciation*, and yielding and paying therefore during the last 20 years of the term, unto Lord *Colerane*, his heirs and assigns, at the place and on the four feast-days above limited for payment of the yearly rent of 304*l.*, the further yearly rent or sum of 5*l.* for every acre of meadow or pasture ground thereby leased, which *Harwood*, his executors, administrators, or assigns, or any of them, should plough, dig, break up, ear, or convert into tillage, or permit or suffer to be ploughed, digged, broken up, eared, or converted into tillage, during the said last 20 years of the term, and so after the same rate for any greater or lesser quantity than an acre, or for any less time than a year. And *Harwood* for himself, his executors, administrators, and assigns, and for every of them, covenanted with Lord *Colerane*, his heirs and assigns, to pay the rent of 304*l.* yearly and every year during the term of 98 years, and also the rent or sum of 5*l.* for every acre of the meadow or pasture ground thereby leased, which should be so ploughed, digged, broken up, eared, or converted to tillage at any time during the last 20 years of the term, on the several days and times, and in such manner and form as was therein limited and appointed for payment thereof, according to the true intent and meaning of the several *reddendums* or reservations aforesaid; the Plaintiff then averred the lessees entry, and deduced title to the reversion to the Plaintiffs, and averred that on the 30th of *November* 1807, at *Tottenham* aforesaid, the estate of *Harwood* in the premises, by assignment

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thereof made, legally came to and vested in the Defendants, who entered and were possessed, and averring performance by the Plaintiffs from the time they became so seised of the reversion, yet, protesting that the Defendants had not, since they became so possessed of the premises, observed any thing in the lease contained on the part of the lessee, the Plaintiffs alleged for breach, that after the sealing of the lease, and during the term, and whilst the Plaintiffs were so seized of the reversion, and the Defendants were so possessed of the premises, and within the last 20 years of the term, and before *Christmas-day* 1807, old style, to wit, on the 24th day of *December* in that year, the Defendants did plough, and permitted and suffered to be ploughed, divers, to wit, 65 acres of the said pieces of the meadow-ground called *Hawke's parks*, which ground at the time of the making of the lease was meadow and pasture ground of the demised premises, whereby, and according to the tenor and effect of the lease, and the covenant of *Harwood* so by him made for himself and his assigns with the lessor and his assigns, the Defendants afterwards, to wit, on the feast-day of the nativity of *St. John the Baptist* 1809, old style, became liable to pay to the Plaintiffs 487*l.* 10*s.*, being at and after the rate of 5*l.* a-year for one year and an half of the term, ending on the same feast-day in that year, for each of the said 65 acres of the said meadow and pasture ground of the demised premises, so by the Defendants ploughed, and had neglected to pay the same. The Defendants pleaded in bar of the action, that before and at the time of the commencement of the last 20 years of the term, the 65 acres of ground so ploughed, and permitted and suffered to be ploughed, as in the declaration was alleged, were ploughed, dug, broken up, and in tillage, and continually from thenceforth until the time when the same were ploughed by the Defendants, as in the same declaration

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ration mentioned, continued to be and were in tillage, and were not, nor was any part thereof, during any part of the ſame laſt 20 years of the term, until or at the time of their ſo ploughing the ſame as aforeſaid, meadow or paſture ground of the demiſed premiſes. And for further plea, as to 243*l.* 15*s.*, part of 487*l.* 10*s.*, being at and after the rate of 5*l.* a-year for the laſt three quarters of a-year, part of the ſaid one year and a half of the ſaid term ended on *St. John's day* 1809, old ſtyle, for the 65 acres of meadow and paſture ſo alleged to be ploughed by the Defendants, they pleaded, that they did not, within or during the ſame three quarters of a year, plough, or permit or ſuffer to be ploughed, the ſame 65 acres of meadow and paſture, or any part thereof, nor had or continued the ſame, or any part thereof, in tillage, in or during all or any part of that time. And thirdly, they further pleaded, as to the ſame part of the ſame ſum, for the ſame time, and acres, that they the Defendants, before *Michaelmas-day* 1808, old ſtyle, to wit, on the 24th day of *December* 1807, and on divers other days and times between that day and the laſt-mentioned feaſt-day, ſowed the ſame 65 acres of meadow and paſture ground ſo ploughed by them as aforeſaid with *clover*, and had continued the ſame in and ſo ſowed with *clover* from thence hitherto, and that they had not at any time ſince the feaſt-day had or continued the ſame, or any part thereof, in tillage. The Plaintiffs demurred to the firſt plea, joined iſſue upon the ſecond, and replied to the third plea, that the Defendants, ſince *Michaelmas* 1808, old ſtyle, until the feaſt of *St. John the Baptiſt* 1809, old ſtyle, had and continued the premiſes in tillage. The Defendants joined in demurrer, and the laſt iſſue.

Beſt Serjt. in *Eaſter* term 1811 was heard in ſupport of the demurrer. The conſtruction contended for by

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the Defendant is, that if the whole of the meadow land had been ploughed up 20 years and one day before the end of the term, the Defendants might continue it in tillage during the refidue of the term, without any increafe of rent, which is totally oppofite to the leffor's intention.

Sellon Serjt., *contrà*, contended, that if the whole of the land had been ploughed up more than 20 years before the expiration of the term, the over-rent was not intended to attach, although it fhould be continued in tillage. This was a peculiar cafe. The term was fo long, that the tenants had a fufficient intereft to induce him to make the moft profitable and valuable application of the land for the firft 78 years; the leffor, therefore, knew that he could rely on the tenant's judgment and fenfe of his own intereft, to difcover what that moft valuable application of the foil would be, whether to tillage or pafturage, and he knew that whichfoever was the moft profitable to the tenant for the firft 78, would be the moft valuable to the reverfioner to be continued for the laft 20 years: all he meant, therefore, to provide for, was, that no change detrimental to the leffor fhould be introduced during the laft 20 years, but that the ftate of the property which fkill and experience of the land had previoufly proved to the tenant to be moft beneficial, and which would therefore be fpontaneoufly adopted during the greater part of the term, fhould be continued during the latter end of the term for the leffor's benefit. There would be great hardfhip attendant on a different conftruction: for an affignee, taking the term after 70 years, has no means of knowing which acres were in pafture at the commencement of the term, and may fubject himfelf to over-rents to an enormous extent. This, too, is in the nature of a penalty, againft which the tenant may be relieved. [*Mansfield* C. J. You

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muſt enforce that argument in a court of equity, it cannot be liſtened to in a court of law; but a very great authority in a court of equity has ſaid, that a reſervation of 100*l.* *per* acre for ploughing paſture land, is not a penalty.] If the aſſignee is not the firſt perſon who ploughed up this land, he did not convert it to tillage, and is not therefore within the breach, nor ſubject to the increaſed rent, for thoſe words can apply only to the firſt act of breaking up. The Defendant is in by an under-leaſe, and had no notice of the covenant.

Mansfield C. J. Really, Brother, on the words of this covenant there is no doubt; we cannot tell exactly what was the reaſon of inſerting this *reddendum*, but we may ſuppoſe the leſſor thought it would be clearly more advantageous to the leſſee to let the paſture lie till towards the end of the leaſe; but that he might be tempted in the latter end of the term, by the immenſe profits attending new broken land, to purſue a courſe for his own profit which would be injurious to the inheritance: but we cannot ſpeculate upon the reaſons which induced the parties to enter into this contract; we muſt be bound by the words, which are, "the meadow or paſture ground hereby leaſed." It is argued that the meaning is the ſame as if the parties had ſaid, "which ſhall be meadow or paſture at the commencement of the laſt 20 years:" if they had meant that, it would have been very eaſy to have ſaid, any land which ſhall be meadow or paſture at the commencement of the laſt 20 years of the term. That would, however, have been a very improvident contract on the leſſor's part; for the tenant would have had nothing to do but to begin ploughing, no longer before the commencement of the laſt 20 years, than would ſuffice him to paſs the plough over the whole of the meadow and paſture ground before the laſt 20 years begun. The caſe has

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been argued as if the words were, plough, dig, ear, *and* convert into tillage; and it has been said there could be no breach unless it were the Defendant who converted it into tillage; but the words are, plough, dig, ear, *or* convert into tillage, and we cannot substitute new words for those which the lessor has used. And even if that were not the motive for inserting this covenant which I have supposed, but if it were in the lessor's mind that the lessee might be at liberty to plough it all up during the first 78 years of the lease, then this reservation would operate to compel the tenant to let all which was ever meadow at the time of the demise, be pasture again for the last 20 years.

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HEATH J. I agree with my Lord in the construction of this *reddendum:* it precludes the tenant from ploughing during the last 20 years, whether the land was first ploughed before the beginning of the 20 years or after, the words ear, plough, &c. apply, if the pasture land had begun to be ploughed before the 20 years, and the words "convert to tillage" apply, if the pasture land first began to be ploughed afterwards. The value of the reversion of tillage land is much less than of pasture land, which is a sufficient reason why a lessor should insert such a covenant.

LAWRENCE J. I am of the same opinion. I agree with my brother *Sellon* that it was a matter indifferent to the lessor what was done during the first part of the lease, so long as his reversion was not injured; therefore, he says, you may do what you will during the first period, but whatever was meadow when I demised, must be meadow for 20 years before I take it back, that I may receive it in the state of ancient meadow.

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CHAMBRE J. There is no ſort of ambiguity whatever in theſe words: they are alternative: the firſt words, ear, plough, dig, &c. apply to the caſe of the meadow land being plouged up before the laſt 20 years of the term, the other words provide for a beginning to plough up during the latter part of the term. It is perfectly well known that the value of the inheritance of tillage land is much leſs than of meadow land. There is no doubt or queſtion upon the caſe; the leſſor has choſen to uſe theſe words, and we cannot vary them.

Judgment for the Plaintiff.

Shepherd Serjt., in ſupport of the demurrer, and *Lens* Serjt., in ſupport of the plea, took notes for a further argument, but the Court refuſed it.

The iſſues were tried at the *Weſtminſter* ſittings after *Trinity* term 1811 before *Mansfield* C.J., when the evidence was, that the cloſes mentioned in the declaration had been in tillage for about 40 years paſt: and no evidence was given, except the leaſe, of their having ever been in any other ſtate. They were ploughed in 1807, and bore corn at the harveſt 1808, with which corn red clover and white clover were ſown, and two crops of hay were cut from the clover in 1809; the land had not been ſince ploughed, in conſequence, as it appeared, of the tenant's apprehenſion of the preſent action. It was proved by a perſon of ſkill that a good farmer, intending to lay down arable land to permanent paſture, would not have proceeded by ſowing merely clovers for that purpoſe. The witneſs conſidered it as land ſtill in tillage, although it had not been ſince ploughed. *Lens* Serjt., for the Defendant, contended, that the land had not been and was not now continued in tillage; and that he was therefore entitled to a verdict on theſe iſſues.

issues. He also made a point, which did not arise on the record, that if the land was not continued in tillage, the over-rent would cease. *Mansfield* C. J. was clearly of opinion, that the rent would remain payable during the residue of the term, whether the land continued in tillage or not; but held that the evidence did not prove that the land ceased to be in tillage; and directed the jury that so long as the land remained in corn, or in clover sown with the corn, it was in a state of tillage. In order, however, to enable the Defendants to raise this question, it was agreed by the Plaintiffs, that it should be found for the Defendants that, as to one acre, they had laid it down to permanent pasture for the last three quarters of a year stated on the record; and as to the residue, the jury found a verdict for the Plaintiffs, with liberty for them to move to increase their damages by entering up judgment *non obstante veredicto*, for the three quarters rent of the other acre, in case the Court should be of opinion that the laying down that land to permanent pasture did not extinguish the increased rent thereof.

Accordingly *Shepherd* Serjt. having on a former day in this term obtained a rule *nisi* to increase the damages, (upon which occasion the Court agreed that the Plaintiffs might well have demurred to the two last pleas,)

Lens and *Sellon* Serjts. on this day shewed cause: they contended that the over-rent was to be payable only so long as the plough was going, and called in aid of their construction the words of the *reddendum*, that the rent was to be "after that rate for any less time than a year" that the land might be in tillage. *Nov.* 22.

Shepherd and *Best*, *contrà*, applied this expression to the contingency of the tenant breaking up some of the

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land, at a time when lefs than a year of his term might remain unexpired; admitting, that the leffor had fo far made an improvident contract, as it would permit a tenant to fcourge paftures of a century's prefervation with an exhaufting fummer crop, while there was lefs than a fingle year's over-rent referved in that cafe to compenfate the leffor for the deftruction.

The Court held it to be clear, that laying down the land to permanent grafs again, would not protect the leffee from the future accruing over-rent, and made the

Rule abfolute.

May 14.

THOMAS v. RHODES. (*a*)

A bankrupt, who had brought an action to try the validity of his commiffion, and obtained a verdict, pending a rule to fet it afide, fecretly confeffed judgment to one of his affignees, who was the petitioning creditor, for a fum of money in difcharge of his debt and the cofts of the action, in confideration of the petitioning creditors confenting not to oppofe the bankrupts petition for a *fuperfedeas*. The Court fet afide the judgment, on the bankrupt's application, on 5 *Geo.* 2. c. 30. f. 24.

A Second commiffion of bankrupt, (a firft having been fuperfeded for want of evidence of the act of bankruptcy,) iffued againft the Defendant on the petition of the Plaintiff, whereon the Defendant was adjudged a bankrupt, and the Plaintiff and other perfons proved debts under the commiffion to a confiderable amount, and the Plaintiff and *Lever*, a creditor, were chofen affignees under that commiffion, and empowered *Gray* to take the Defendant's goods, under which authority *Gray* did take them. The Defendant thereupon commenced an action in this court againft *Gray* for fo doing, which action was defended for *Gray* at the expence of the Plaintiff and by his attorney, being the folicitor to

(*a*) *Chambre* J. was abfent on this day in confequence of indifpofition.

the

the commission, and upon the trial, before *Mansfield* C. J., the Defendant obtained a verdict for the value of the goods, subject to leave to move for a new trial. In *Trinity* term 1809 a motion was made, and a rule *nisi* obtained for a new trial, and in the following vacation, pending that rule, a treaty of compromise took place on the behalf of the Defendant, and the Plantiff, without the knowledge of *Lever*, the other assignee, and without the knowledge of any of the creditors of the Defendant, who had proved debts under that commission, except the Plaintiff; in pursuance of which treaty, an agreement was entered into, and signed by the Plaintiff, Defendant, and *Gray*, on the 26th day of *October* 1809, the original of which agreement was left in the hands of the Plaintiff;, and at the same time the Defendant executed a warrant of attorney, to confess judgment at the suit of the Plaintiff, for 400*l.*, subject to a defeazance. The agreement recited that *Gray*, by the authority of the assignees under the commission, had taken away divers goods of the Defendant, and then had the same in his possession, and that a verdict had been obtained in the action by the Defendant against *Gray* for 65*l.*, the reputed value of the goods, and costs, and that if the verdict should stand, the legality of the commission would be negatived, but that *Gray* had obtained a rule *nisi* for a new trial in that action, whereby the application of the Defendant to the Lord Chancellor, to supersede the commission on the footing of that verdict was necessarily deferred till next term; and that to obviate that, and other difficulties and inconveniences, and to put an end to various litigations and disputes, the Defendant and the Plaintiff, the petitioning creditor for the commission, had that day come to an account, in which the Plaintiff had credited the Defendant a sum of money as the estimated amount, and in full discharge of his costs of the action against

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Gray, and recited, that all other juſt allowances of debts and credits, for coſts and otherwiſe, had been made between the Defendant and the Plaintiff, and that the liquidated balance in favour of the Plaintiff was 200*l.*, which the Defendant, by the direction of the Plaintiff, thereby ſignified, had that day ſecured to be paid by a warrant of attorney bearing even date, (and which warrant of attorney the Plaintiff thereby declared to be in full ſatisfaction and diſcharge of all his demands on the Defendant, and on his eſtate and effects,) and it was thereby declared and agreed between the three parties, that the goods ſhould be reſtored to the Defendant, and ſhould be conveyed at the expence of *Gray* to the Defendant's dwelling-houſe within ſix days, and which goods ſhould be accepted and taken by the Defendant in full ſatisfaction and diſcharge of the 65*l.* damages; and that the action ſhould be no further proſecuted; and it was further agreed that the commiſſion ſhould be ſuperſeded on the petition of the Defendant for that purpoſe, without any oppoſition to be made by the Plaintiff, but who, on the other hand, ſhould do every thing in his power to forward and effect the *ſuperſedeas*: and laſtly, that in caſe either from the interference of *Lever*, the other aſſignee, or other creditor or creditors, or otherwiſe, the Lord Chancellor ſhould refuſe to ſuperſede the commiſſion on the petition of the Defendant, (ſuch proceedings for the *ſuperſedeas* to be forthwith proſecuted by the Defendant or his ſolicitor, and in no ways neglected,) then the warrant of attorney ſhould be null and void, and ſhould be delivered up to be cancelled, and that *Gray* ſhould be liable to the coſts of that action, to be taxed; but with reſpect to the 65*l.* damages, given by the jury, *Gray* was, on the reſtoration of the goods, within the time and manner aforeſaid, wholly releaſed and diſcharged therefrom.

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The defeazance on the warrant of attorney, ftated that it was given for fecuring the payment of the fum of 200*l.* and intereft, to be paid, as to 33*l.* 6*s.* 8*d.*, part thereof, on the 26th day of *October* 1810, and the remaining fum of 166*l.* 13*s.* 4*d.*, by quarterly payments of 8*l.* 6*s.* 8*d.*, each then next following; that fum of 200*l.* being a balance of the fum of 401*l.* due from the Defendant to the Plaintiff, after allowing what money the Plaintiff might have received under the two commiffions iffued againft the Defendant, or that might be due from the Plaintiff to the Defendant, and after allowing all cofts, charges, damages, and expences that the Defendant or his folicitor might have, or claim, againft the Plaintiff or *Gray*, or either of the affignees under the two commiffions iffued againft the Defendant, or any cofts or charges the Defendant or his folicitor might have or claim againft the Plaintiff, *Gray*, or the affignees under the two commiffions, for any proceedings that had already been had, or might hereafter be had, under or by virtue of any petition, order, action, judgment, or in any wife however, the Plaintiff not oppofing the Defendant's applying for and fuperfeding the laft commiffion againft him by the Plaintiff. But that no judgment was to be entered up or execution to iffue againft the Defendant, till default fhould be made in payment of fome one inftalment of the fum of 200*l.*, and in cafe of fuch default execution fhould iffue only for the inftalment or inftalments due, and not for the whole remaining debt, together with the cofts of the judgment on the firft levy, and the cofts of the execution and officer on every fuch levy; and the judgment, if entered up, was to ftand without being revived till the whole of the principal and intereft fhould be fully paid off and fatisfied. The Defendant afterwards prefented a petition to the Chancellor to fuperfede the commiffion, on the ground of the verdict againft *Gray*, with

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with which petition the Plaintiff was duly served, and which came to a hearing in due course, and no counsel or solicitor appearing for the Plaintiff, His Lordship, by his order, dated the 10th of *March* 1810, ordered the commission to be superseded accordingly. The Plaintiff having entered up judgment on the warrant of attorney, and executed a writ of *fieri facias*, and a writ of *capias ad satisfaciendum*, on which writs the Defendant had paid into the hands of the Sheriff of *Middlesex* sums amounting to 53*l.* 10*s.* *Pell* Serjt. had on a former day obtained a rule *nisi* that the judgment might be vacated, and that the several writs of execution issued and executed thereon might be quashed, and that the sum of 53*l.* 10*s.*, paid by the Defendant into the hands of the Sheriff of *Middlesex* might be returned to the Defendant.

Best Serjt. now shewed cause: he contended that the statute 5 *G.* 2. *c.* 30. *s.* 24. would not assist the Defendant in this case; that statute, he said, as was manifest from the preamble, was made for the benefit of creditors, and if this application had proceeded from a creditor who had been hindered of his debt by this transaction, there might have been some colour for the application: but this motion originated with the bankrupt himself, who being party to the fraud, if it were a fraud, so far as related to the interests of the other creditors, both he and the Plaintiff were in *pari delicto*, and the Court would not assist him. Transactions, fraudulent as they respect others, are good as between the parties, and it was not competent to the Defendant to impugn the security he had given, after having reaped the fruit of his act.

Shepherd Serjt. and *Pell* in support of the rule. The preamble of the section shews that the act was made as well

well to protect the bankrupt himself from oppression, so that no advantage might be taken of the hardship of his situation, as to protect his property from an undue application. The process of the Court is here put in force, if not illegally, yet unduly, and the Court will therefore interfere to set it aside. The accord of the Plaintiff to the *supersedeas*, by not coming in to oppose it, is, itself, a fraud on the rights of the other creditors and the justice of the country.

MANSFIELD C. J. This case is a little singular in its circumstances. The bar have not found, nor do I know, any case exactly similar. But it is plain that the legislature thought, and all must concur in that opinion, that it is wrong that any man suing out a commission, should gain an advantage to himself, in which all the creditors do not share. Here, the first commission was superseded by order of the Chancellor, (there not being evidence then to support it,) and a second commission being sued out, it is a doubt, whether, on the verdict, it could be supported; the Plaintiff was the petitioning creditor and assignee; it was his duty to support the commission if it possibly could be supported. This second commission is taken out on the same debt, due to the same petitioning creditor, on the same act of bankruptcy. What then does the petitioning creditor do? After receiving his dividends *pari passu* with other creditors, he puts 200*l*. in his pocket, thus applying to his own use the other creditor's money; for it is stated that the 200*l*. is a balance due to him after the sums he has received. It appears therefore that he consents to superseding the commission upon having that sum of 200*l*. secured to him by warrant of attorney. This gave the Plaintiff, as a creditor, an extraordinary advantage, for it not only deprives the others of their dividends under the commission, but puts the Plaintiff

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Plaintiff in a very favourable situation for securing his own debt, to the exclusion of the other creditors; therefore it is fit that the judgment and execution should be set aside.

HEATH J. I am of the same opinion. This transaction is bottomed in fraud with respect to the other creditors, and in oppression with respect to the bankrupt.

LAWRENCE J. I do not think the circumstance of the application being made by the bankrupt, makes any difference; for the act was made for the protection of bankrupts.

Rule absolute.

May 14.

DE ROUFIGNY v. PEALE.

If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the Defendant's attorney neglecting to deliver his briefs, the Court will grant a new trial, compelling the Defendant's attorney to pay the costs, as between attorney and client, out of his own pocket.

THIS cause had stood first in the cause-paper for trial at a sittings in term; when the cause was called on, the Defendant's attorney had delivered no brief to his counsel, although he had had a consultation with him the preceding night; and the cause being thus undefended, a verdict passed for the Plaintiff. Soon after the verdict had been recorded, the Defendant's attorney came into court with a brief to instruct his counsel to defend the cause.

Vaughan Serjt. now moved to set aside the verdict, and have a new trial, on payment of costs.

The Court held, that it would be only encouraging the negligence of attornies, to grant such an indulgence, in the ordinary way, at the client's expence: attornies ought to know that they are amenable to their clients

for

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DE ROUFIGNY *v.* PEALE.

for the consequences of such neglect; neither would it be putting the Plaintiff in the same situation if they were to grant the rule on the payment of costs between party and party: they therefore granted a rule *nisi*, which on a subsequent day was made absolute, for a new trial, upon payment by the Defendant's attorney, out of his own pocket, of all costs as between attorney and client.

DOE, on Demise of PRIOR and Wife, *v.* SALTER.

May 15.

The only mode of recovering the costs of a nonsuit upon the merits in ejectment, is to serve the lessor of the Plaintiff with a copy of the consent-rule, and *allocatur* of costs, and to attach him if he does not obey.

LENS Serjt. moved for an attachment against the lessor of the Plaintiff, for not paying the costs of the nonsuit, which had passed upon the merits, in this ejectment: he moved upon an affidavit that a *capias ad satisfaciendum* had been sued out against the nominal Plaintiff, and served on the lessors of the Plaintiff, and as they had not paid the costs upon sight of that writ, and the *allocatur* of costs, it was conceived they were now in contempt.

The Court held that the only mode to get the costs of a nonsuit, which proceeds upon the merits, in ejectment, is to serve the party with a copy of the consent-rule, and *allocatur* of costs; after which, an attachment may issue: and MANSFIELD C. J. expressed a hope, that nothing so absurd as a *capias ad satisfaciendum* against the nominal Plaintiff would ever again be heard of.

Rule refused.

1811.

May 18.

FILMER v. DELBER.

After an order of reference has been made with the consent of counsel and attorney, the Court will not set it aside on an affidavit by a party exprefsly denying his attorney's authority to refer; though the application be made before any step taken by the arbitrator, excepting the appointment of a meeting.

CLAYTON Serjt. moved to set aside an order of *nisi prius* by which this cause had been referred to a barrister, on an affidavit by the Defendant, stating that she had exprefsly desired her attorney not to consent to any rule of reference. No step had yet been taken by the arbitrator, excepting that he had appointed a distant day for a meeting, in order to give time for this motion. In answer to a question by the Chief Justice, whether there was any precedent for the Court's interference in such a case, *Clayton* Serjt. cited the case of *The Mayor of Morpeth* v. *Lord Carlisle*, *ante*, 378., where the Court intimated that an application might be made to them to vary the terms of the rule of reference.

MANSFIELD C. J. That was where it was thought that the intention of the parties had been misunderstood; but here is an exprefs agreement to refer properly entered into by counsel and attorney; it is now said that they had no authority to enter into that agreement; if so, the Defendant's remedy is by action against her attorney. There would be no end to these applications if the Court were to interfere; such interference would lead to collusion; when a party did not like the prospect of the reference, he would say that he had never given his attorney authority to refer.

Rule refused.

1811.

THACKTHWAITE *v.* COCK and Others, Aſſignees of MOORE a Bankrupt.

May 20.

A cuſtom that purchaſers of hops from hop-merchants ſhall leave them in the merchant's warehouſe for the purpoſe of reſale, upon rent, undiſtinguiſhed from the merchant's ſtock, is not ſuch a cuſtom of trade as will prevent the hops from becoming the property of the merchant's aſſignees, in caſe of bankruptcy, as being in his poſſeſſion, order, and diſpoſition.

THIS was an action of trover for hops. Upon the trial of this cauſe at *Guildhall*, at the ſittings after *Michaelmas* term 1810, before *Mansfield* C. J., the caſe appeared to be, that the Plaintiff, in *November* 1808, purchaſed 78 pockets of hops, the goods in queſtion, of *Moore*, who was a hop-merchant, and paid for them, and agreed with him that the hops ſhould remain in *Moore*'s warehouſes at the rent of a penny a pocket *per* week until the Plaintiff ſhould think it advantageous to re-ſell them. In 1810 *Moore* became a bankrupt, and his aſſignees, finding theſe goods on the premiſes, and conceiving theſe hops to be goods in the ordering and diſpoſition of the bankrupt, within the ſtatute 21 *Jac.* 1. *c.* 19. *ſ.* 11., refuſed to deliver them to the Plaintiff. The Plaintiff endeavoured to take the caſe out of this ſtatute, by proving a cuſtom of the trade for purchaſers of hops to permit their hops to remain upon rent in the hop-merchants' warehouſes: one witneſs had known hops to remain five years, and another nine years, in that manner, and all the witneſſes ſpoke to the frequency of the practice. The bankrupt, being called as a witneſs, ſtated, that when the Plaintiff made his purchaſe, he had aſked of the witneſs, whether it was not uſual to leave the goods on rent in the ſame warehouſe, who anſwered that it was; he admitted, however, that he had ſeldom known any left ſo long as theſe. The hops were expoſed to the view of perſons coming into the warehouſe to purchaſe, promiſcuouſly with the other goods of the bankrupt; they were not diſtinguiſhed by any conſpicuous mark from *Moore's* goods, becauſe any thing that would draw attention to the length of time

they

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THACKTHWAITE v. COCK.

they had been on sale, would hurt the sale of them. No rent for warehouse room had been charged or received before the time of *Moore*'s bankruptcy, but an offer to pay had been made by the Plaintiff to the assignees. The jury found a verdict for the Plaintiff, with one shilling damages, the Defendants undertaking to deliver the hops.

Lens Serjt. having in the last term obtained a rule *nisi* to set aside the verdict and enter a nonsuit,

Shepherd and *Best* Serjts. in this term shewed cause. They first observed, that the form of the rule was wrong, for that if the Defendants succeeded, they would be entitled only to a new trial, not to enter a nonsuit. They contended that as *Moore* had no general authority from the Plaintiff to sell these goods, but merely held them upon rent, he had not the possession, order, and disposition of them as owner, neither did he take upon himself the sale, alteration, or disposition of them as owner. The words in the statute were all connected by a copulative, not by a disjunctive, conjunction, and it was therefore necessary, that the bankrupt should have all of these to bring the case within the statute: *Moore* had none of them except the mere possession: he was a mere warehouse-keeper, and came neither within the words or the spirit of the act; for the custom of the trade being known, the possession of the goods could not induce others to give that credit, which constituted the mischief intended to be remedied by the act. The mere possession of the goods, if reconcileable with any other purpose than the ordering and disposition of them by the bankrupt as owner, does not bring the case within the act; and this feature forms an important distinction between the present case and that of *Horne* v. *Baker*, 9 *East*, 215.; but even there, *Le Blanc* J. threw

out, that if there were a cuſtom of the trade, it would take the caſe out of the ſtatute. 1811.

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Lens Serjt. *contrà*. The viſible ownerſhip of theſe goods was in *Moore*, and it was proved that if there had been any mark to diſtinguiſh them from *Moore*'s goods, the very object of leaving them with him would have been defeated, which was, to give them the appearance, in the eye of cuſtomers, of being part of *Moore*'s ſtock; for if it had been known that they had been ſo long in hand, it would have hurt the ſale of them; nor would they ſell ſo well, if it were known they were there on account of another perſon. This ſecret mode of dealing is therefore directly within the ſtatute. *Moore* is not a factor, but a merchant. In *Horne* v. *Baker*, the ſort of uſage alluded to was a practice of letting diſtillers' utenſils for rent; but that is a very different caſe from an uſage to leave goods intended for ſale in a warehouſe, indiſtinguiſhable from the goods of the merchant. As to the argument drawn from the copulative particle in the act, if that be well founded, no goods of another can ever in any caſe belong to the aſſignees; for the law is not to attach unleſs the bankrupt ſhall have completed all the acts mentioned in the ſtatute, one of which is the ſale, and if that is completed, of courſe the aſſignees cannot afterwards have the goods, ſo that the act would by this conſtruction be rendered totally inſufficient. And whether the bankrupt could, as between himſelf and the Plaintiff, have ſold theſe goods or not, that cannot affect the law of bankruptcy, and the rights of creditors, ſo long as the goods were purpoſely made undiſtinguiſhable from the bankrupt's property, that it might not be ſuppoſed they were the goods of a perſon neceſſitated to ſell. The bankrupt had, beſides, another warehouſe, not ſo open to inſpection; but theſe goods were kept among his

faleable ftock. Perfons who came to buy his own hops, faw thefe hops too.

In the courfe of the argument MANSFIELD C. J. expreffed his opinion that the authorities extant were wholly inconfiftent with, and an anfwer to, the argument drawn from the conjunction in the act being copulative and not disjunctive. He had never before known the queftion made, that it was neceffary to prove fome act of difpofition of the depofited goods, much lefs that the bankrupt muft exercife all the acts mentioned in the ftatute, before the goods can become part of his ftock.

LAWRENCE J. obferved, in the courfe of the argument, that what was faid in the cafe of *Horn* v. *Baker*, chiefly refpected pieces of machinery, vats, and other fimilar utenfils, which in their nature refembled fixtures; but that loofe veffels, of which it is ufual for the poffeffors to be the owners, were goods within the difpofition of the bankrupt. In the counties of *Nottingham* and *Leicefter*, it was extremely common for the working hofiers to have on hire the poffeffion of ftocking frames, valuable machines, which they were unable to purchafe, and which came within the reafon of job carriages, job horfes, and the like.

CHAMBRE J. obferved, that in *Horn* v. *Baker*, reliance was placed on the circumftance, that two out of three former owners had continued in poffeffion, the third having retired, which, the Court thought, was quite fufficient to give the reputation of ownerfhip.

MANSFIELD C. J. delivered the opinion of the Court.

It feems to the Court, and the more I confider it, the more I am ftrengthened in that opinion, that though the

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the cuftom of a trade may have the effect referred to in *Horn* v. *Baker*, it muft be a cuftom much more clearly proved than this is, and muft be fuch a cuftom, that perfons dealing with the traders may fee and know that the goods may poffibly not be the property of the poffeffor. Here is a cuftom to put no mark on the hops, fo that no perfon may perceive or know that they are not the property of the feller. The reafon is, that after hops have laid a year, they deteriorate; and therefore if *A. B.*, or any other ear mark, were vifible, it would hurt the fale when that mark got old and known; and therefore they are not to be diftinguifhed from the common ftock of the feller. There is not, therefore, fuch a clear, diftinct, and precife cuftom proved, as would enable others to fee that thefe may not be the hops of the poffeffor. The cuftom is, to let hops which are fold remain in fuch a manner, that it may not be known that there has been a fale. The objection againft difclofing the real owner would be eafily obviated, by having a feparate warehoufe, marked as a warehoufe for hops held there for the benefit of the perfons who had bought them. I therefore think the verdict is wrong; and it is unneceffary to grant a new trial, becaufe I have no idea of any evidence that can be given, confiftently with the evidence given in this cafe, that could prove any fuch cuftom as is requifite to fupport this action. There muft therefore be a

Rule abfolute for a nonfuit.

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May 20.

CLARKE and Another, Executors of LENNARD *v.* GORMAN.

The Defendant in putting in bail, misinstructed the filazer as to the *Christian* name of one of two Plaintiffs: the Plaintiff's attorney thereupon swore that there were no bail in that action, and moved that the Defendant's attorney might pay debts and costs for superseding the Defendant. The Court discharged the rule, with costs, to be paid by the attorney so swearing.

BEST Serjt. had on a former day moved that the Defendant's attorney might pay the Plaintiff his debt and costs, and the costs of that application, upon an affidavit of Mr. *Joseph Hill*, the Plaintiff's attorney, that the Defendant's attorney had put in no bail in that cause, but had nevertheless sued out a *supersedeas*, and had discharged the Defendants out of custody. The Court, considering this as a gross abuse of their process, granted a rule *nisi*.

Shepherd Serjt. now shewed cause, whereupon it appeared, that the Defendant's attorney had served notice of bail, who actually justified, and the Defendant applied for and obtained the allowance of bail; but what Mr. *Joseph Hill* meant by swearing that there were no bail in that cause was, that the Defendant's attorney had given in to the filazer the name of *Henry Henman* instead of *Edward Henman*, as one of the Plaintiffs, who were nevertheless described as executors of *Lennard*.

Best, in support of his rule, admitted that he had himself been misled by the nice wording of the affidavit, to suppose that no notice at all of bail for the Defendant had been given by his attorney; but though he had misconceived that fact, the affidavit was legally true; for there were no bail in the cause of *Clarke* and *Edward Henman* against *Gorman*.

MANS-

MANSFIELD C. J. The affidavit is grofsly falfe in fubftance: no honeft man would have fworn to it.

The Court difcharged the rule with cofts, to be paid by the deponent.

FOY v. BELL.

May 21.

Although generally an underwriter having fubfcribed a policy, and thereby confeffed the receipt of the premium, is eftopped from afterwards claiming the premium againft the affured, yet where, by the fraud of the affured, the underwriter is induced to give credit for the premiums to the broker, and the broker to give credit to the affured, the underwriter is entitled to receive the premiums from the affured.

THIS was an action upon four policies of infurance, effected by *A. Gordon*, as agent for the Plaintiff, upon the fhips *Vigilant*, *Paradife*, *Friede*, and *Flora*, from various *Northern* ports to *England*: the Plaintiff claimed a lofs upon the *Vigilant* of 99*l.* 4*s.* 4*d.* *per cent.*, amounting upon the Defendant's fubfcription to 297*l.* 13*s.*, and a return of ten *per cent.* upon the Defendant's fubfcriptions on the other fhips, for convoy and arrival, amounting to 90*l.* more; making together the fum of 387*l.* 13*s.* The Defendant gave notice of fet-off for the premiums upon thefe very policies, and for the premium of another policy effected by the Plaintiff through the fame agent with the Defendant on the fhip *Wilhelmina*, together amounting to 582*l.* 15*s.* Upon the trial of the caufe at the *London* fittings after *Hilary* term 1811, it appeared that the Plaintiff, who refided at *Pillau*, procured *A. Gordon*, who was a young man juft embarking in bufinefs, to effect the feveral policies in queftion, upon an affurance that he would addrefs the fhips to him, and permit him to receive the freight, and reimburfe himfelf thereout for the amount of the premiums: upon a communication of this propofal to the underwriters, they gave *Gordon* credit for the premiums. The Plaintiff alfo remitted to *Gordon*, whom he had drawn into other tranfactions with him, bills on *Thornton* and *Bayley*, which the latter refufed to accept,

 alleging

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alleging that they waited for ſome explanation from the Plaintiff, but that all would be right, and in the mean time offered to accommodate the Plaintiff by accepting his own bills for the like amount upon the ſecurity of theſe policies, which *Gordon* accordingly depoſited in their hands. The Plaintiff, inſtead of conſigning his ſhips to *Gordon*, as he had promiſed, conſigned them to *Thornton* and *Bayley*, and aſſigned the freight to them, ſo that *Gordon* was left deſtitute as well of the means of receiving the loſs on the *Vigilant*, and returns of premium, as of the expected funds to ariſe from the freight for the payment of the premiums to the underwriters. The Defendant, therefore, claimed now to ſet off the premiums, which he had never received, againſt the loſs and returns to which he was liable. The jury, thinking that when the underwriter ſigns a policy, and thereby acknowledges the receipt of the premium, the account is finally cloſed between the aſſured and underwriter, found a verdict for the Plaintiff.

Lens Serjt. having in this term obtained a rule *niſi* to ſet aſide the verdict, and have a new trial,

Beſt Serjt. ſhewed cauſe. He contended that it was not competent for the underwriter to diſpute the fact of the payment of the premium, which he had ſolemnly acknowledged on the policy, againſt the aſſured. In the caſe of *Dalzel* v. *Mair*, 1 *Campb. N. P.* 532., which bore at leaſt as much the aſpect of fraud as this does, the policy was held to be concluſive evidence of payment. The diſtinction is taken in the caſe of *Airy* v. *Bland*, 1 *Park*, 6 *Ed.* 34., that as between the broker and underwriter the policy is not concluſive evidence of the payment of the premiums, but as between the underwriter and aſſured, it is concluſive. If there had been any ſuggeſtion of fraud, that was a fact to be tried

 by

by the jury, who have found that there was no fraud. [*Lawrence* J. obferved, that the like verdict had been found in the cafe of *Mavor* v. *Simeon* in this court, *poft*. 497. *n*., yet the Court did not think that the finding concluded the fact, there being evidence of fraud.]

Lens and *Vaughan* Serjts., *contrà*, contended, that there was in this cafe abundant evidence of fraud. The credit which *Gordon* obtained was created and kept up by the reprefentations which the Plaintiff enabled *Gordon* to make to the Defendant. It did not therefore lie in his mouth, to claim a repayment of premiums as having been paid, which in truth never were paid, and which failed to be paid through the Plaintiff's own grofs treachery, without at leaft allowing thofe premiums in account. [*Mansfield* C. J. fuggefted, whether if the Plaintiff procured the policies to be effected, knowing that the premiums were not paid, and that he never intended to fupply the funds to pay them, that fraud would not make the policy void, and in fuch cafe the confequence would be that the Plaintiff would not be entitled to recover the lofs upon the *Vigilant*.] *Lens* denied that the policies would be void.

The Court were all of opinion that there ought to be a new trial. The jury were ftrongly impreffed in this cafe, as they were in the cafe of *Mavor* v. *Simeon*, with the general doctrine that the tranfaction is clofed when the underwriter writes his receipt, and that he cannot afterwards fay the premium has not been paid. But the Plaintiff knew, as appeared by his own letters, that *Gordon* was perfectly unable to pay thefe premiums. The Plaintiff had prevailed on him to effectuate thefe policies, in effecting which he knew that *Gordon*, according to the common courfe of bufinefs, got receipts for this immenfe fum, and he knew that the Defendant

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FOY v. BELL.

muſt give theſe receipts. The Plaintiff knew that *Gordon* had no fund out of which that money could have been paid. He knew that, according to the courſe of buſineſs, though receipts were to be given by the underwriters who ſubſcribed the policies, yet in fact no money had ever paſſed between the underwriter and broker: he knew he had promiſed the broker to put into his hands the proceeds of the cargo of the *Vigilant*, and that he ſhould alſo receive the freights of the other three ſhips: and then with regard to the freights, he has given the freights of theſe three ſhips to *Thornton* and *Bayley*; they became the aſſignees of the ſhips, and received the freights, and therefore the Plaintiff knew that the broker never paid the premium. Knowing then that *Gordon* received the receipts, and that he never would pay the premium, he brings actions in this court to recover back premiums which he knew never were paid, nor could be paid. So that this is a monſtrous propoſition on the part of the Plaintiff, who ſays by this action againſt the underwriters, return me that premium which you never received, but which you ought to have received, and which you would have received, if I had not cheated the broker, by promiſing him this fund out of which he was to pay the premium, and then diverting it into another channel. It is impoſſible that can be ſupported, and therefore there muſt be a new trial.

Rule abſolute.

MAVOR *v.* SIMEON.

1810.
May 14.

An underwriter after executing a policy and giving credit to the broker for the premium, may recover the premium againſt the underwriter, if it appear that the aſſured, to cover a balance due from the broker to himſelf, procured him to effect the inſurance, debiting the aſſured in account with the premiums, and lodging the policies in the hands of the aſſured to enable him to receive the loſſes.

THE Plaintiff declared, that in conſideration that the Plaintiff had before that time, as an inſurer, underwritten certain policies of aſſurance as to certain ſums therein ſubſcribed againſt his name on the ſhips and merchandizes in thoſe policies ſpecified, without receiving the premiums therein mentioned, the Defendant undertook to pay him ſo much as the premiums amounted to, upon requeſt: there were alſo a count for intereſt, and the uſual money counts. Upon the the trial of the cauſe, at the *London* ſittings after *Michaelmas* term 1809, before *Mansfield* C. J., it appeared that the Defendant having long employed *Haynes*, a broker, to effect inſurances for him; and the broker being conſiderably indebted to him on the balance of accounts, and the Defendant much ſuſpecting his circumſtances, it was agreed between them, in order to keep the broker from bankruptcy, and to liquidate his debt due to the Defendant, that *Haynes* ſhould continue to effect inſurances for the Defendant as uſual, and ſhould *debit* him with the premiums, but ſhould lodge all the policies in the Defendant's hands, and permit him to receive the loſſes and returns of premium. The broker accordingly effected policies with the various perſons, the premiums on which amounted to 12,000*l.*, and amongſt others with the Plaintiff, none of whom ever received the premiums, but credited the broker with the amount: the broker lodged the policies in the hands of the Defendant, who never paid the broker the premiums. This courſe of dealing continued until the premiums for which *Haynes* credited the Defendant, exceeded the balance due to him by 200*l.*, the Defendant then ceaſed to employ *Haynes* to effect any more policies. It was contended for the Defendant, that the Plaintiff having acknowledged on the face of the policies the payment of the premiums, was eſtopped from claiming them as againſt the underwriter; if he choſe to give credit to the broker, that was at his own riſk; but to the broker alone could he reſort for payment, if he did not inſiſt on receiving it at the time of executing the policy. If this were not ſo, there would be an end of the whole ſyſtem of underwriting. The ſpecial jury, unwilling to ſubvert ſo important a branch of trade, found a verdict for the Defendant.

Cockell Serjt. had obtained a rule *niſi* for ſetting aſide the verdict, and having a new trial, againſt which

Shepherd and *Beſt* Serjts., in *Hilary* term 1810, ſhewed cauſe. As to the ſpecial contract ſtated in the firſt count, there was no evidence whatever of any ſuch contract being made in fact, and it was not a contract which could ariſe by implication of law, for the contract which the law would imply, muſt be according to the uſage of the trade; and the uſage of the trade was directly in oppoſition to any ſuch practice. *Haynes* was employed to effect inſurances after the arrangement

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MAYOR v. SIMEON.

rangement between him and the Defendant, precisely in the same way as before, there was no alteration made in the manner of doing business: no communication upon the subject was made by *Haynes* to the underwriters: if, therefore, the balance of premiums, upon the statement of accounts between *Haynes* and the Defendant, had been in favour of *Haynes*, his assignees, (he having become a bankrupt,) would have had a right to recover that balance of premiums against the Defendant. The Defendant did not create these voyages and cargoes for the purpose of getting money from the underwriters; he was proceeding in the ordinary course of his merchandize, and caused *Haynes* to proceed in the same way, making only this alteration, that he required permission to receive the losses himself, which he had a right to do. *Dalzell* v. *Mair*, 1 *Campb.* 532., was precisely similar. This is not the case (to which *Cockell* compared it,) of a man, who suspecting his creditor, makes a large purchase of him, as in *Martin* v. *Pewtriss*, 4 *Burr.* 2476., with intention to set off the prices. All the cases prove this principle, that the contract of assurance is a contract between the assured and the broker, not between the assured and the underwriter, and the bargain is such, that, in the language of *Buller* J., *Grove* v. *Dubois*, 1 *T.R.* 125., "It makes "no difference whether at the "time of making the policy, "the underwriter knew the prin-"cipal or not: he trusted to the "broker, and credit was given "to him, not to the other." [*Lawrence* J. That case turned on the effect of a *del credere* commission. You say that there is a distinct contract between the broker and the underwriter; but if the assured be not a party how could he sue on the loss. The argument requires, that at least this should be a tripartite contract, for the underwriter engages to pay a loss and to return premiums.]

Adjornatur.

Cockell and *Marshall* Serjts., on a subsequent day were heard in support of the rule, and the Court took time for consideration; but the rule was discharged two days after upon a compromise. And on this day the cause being named, the Counsel informed the Court that it was compromised, so that no judgment was given; but the inclination of the Court was visibly in favour of the Plaintiff.

1811.



MELLISH *v.* STANIFORTH.

May 24.

A warranty against capture in the ship's port of discharge, does not include capture in the open sea on the outside of the port by a force issuing from the port of discharge.

THIS was an action upon a policy of insurance at and from *Gottenburgh* to the ship's port of discharge in the *Baltic*, warranted free from capture and seizure in the ship's port or ports of discharge, upon the ship *Suwarrow*, and the insurance was declared to be on goods: the premium was ten guineas *per cent.*, to return five pounds for arrival. The loss was averred to be by hostile capture on the high seas. Upon the trial of this cause at *Guildhall*, at the sittings after *Hilary* term 1811 before *Mansfield* C. J., it was proved that at the time of effecting this insurance, the circumstance of the warranty contained in this policy made the difference of one half in the premiums upon this risk. The vessel, having on the 20th of *August* taken a pilot on board at *Poehl*, who informed the master that the *French* were in possession of *Wismar*, came to an anchor in the open sea, at the south point of the isle of *Poehl*, about one *German* mile and three quarters, or seven *English* miles distant from *Wismar*, at which place she was destined to deliver her cargo, not within the reach of any guns from the shore; and on the same day, about five hours after, eight *French* soldiers came off in a boat from *Wismar* and took possession of the vessel, and on the following day a *French* officer coming off ordered the ship under weigh, and brought her to an anchor three or four miles further in, but in the roads of *Wismar*, not in the harbour, as she drew too much water to enter the harbour of *Wismar*, in which were only eight or nine feet water. The captors discharged her cargo in the roads, and carried it on shore in lighters. The master of the vessel and other witnesses proved that he could have gone further in, within two *English* miles of the

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MELLISH v. STANIFORTH.

the harbour; that the place where he cast anchor was not within the port of *Wismar*; that vessels do not discharge their cargoes there, but usually approach four *English* miles and a quarter nearer to *Wismar* before they begin to discharge their cargoes; that there were two fathoms water in *Wismar* roads, and that this vessel, which drew not more than eleven feet water, could have safely gone in within three *English* miles of the shore. The reason why the pilot did not carry him into *Wismar* roads immediately on his coming on board, was, that although the wind was fair for him to carry the ship in, it was not fair for him in case of danger to get out again. The Chief Justice being at that time of opinion (*a*) that it was a question of law whether the vessel were in port within the meaning of the warranty, the jury found a verdict for the Plaintiff, subject to this point reserved,

Accordingly *Lens* Serjt. having obtained in this term a rule *nisi* for a new trial,

Shepherd and *Best* Serjts. shewed cause, contending, that upon the words of this warranty, which like other conditions must be strictly and literally construed, it was wholly immaterial whether the capturing force issued from the port of discharge or not, provided that the vessel was not within the local ambit of the port of discharge at the time of her capture; on the other hand, a vessel captured within her port of discharge would be equally within this warranty, whether the capturing force had come from the coast of the opposite country, or had issued from the port. The only question was, as to the local position of the ship at the time of this

(*a*) But see *Reyner* v. *Pearson*, *contrà*, 21 *Nov.*, *Michaelmas* term, 1812, *post*.

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capture; and it was quite clear from the evidence, that she was not then within her port of discharge; the reasons why she had not been brought within that port were also immaterial, but if it was fit to enquire into them, the reason in this case was a very good one, it was the duty of the master to his employers not to run his ship into the jaws of danger, from which he could not again extricate himself. This was a much stronger case for the Plaintiff than the *Pillau* cases, in which the vessels had arrived at a situation where they usually lighten in preparation for passing the bar, and the captain had actually gone on shore to the custom-house with his papers. The circumstance of having a pilot on board does not mark the vessel as being in port. No vessel can legally come up the *Thames* or go round the back of the *Isle of Wight* without a pilot: Yet it cannot be said that all vessels in those situations are in port.

Lens and *Vaughan* Serjts. *contrà*. The port of destination furnishing the hostility intended to be guarded against by this warranty, this loss is, within the meaning of the warranty, to be borne by the assured. In the *Pillau* cases the force did not issue from the port of discharge; the *Tilsit* privateer, which made the captures, came from *Dantzic*; had it come out from *Pillau*, the losses would have been within the warranty. The jury have not determined the point as a fact, whether this vessel were in port or not, they have expressly referred that point to the consideration of the Court. If the vessel had been lost off the south end of the Isle of *Poehl*, by capture by an extrinsic force, certainly that would be one of the perils against which the underwriters insure.

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MANSFIELD C. J. In this cafe the jury certainly were ftruck with that which is obvious to every one, that if a captain, acting either with or without the orders of his owner, means to be taken, he was as certain of being captured in the fituation where this veffel anchored, as in port; fo that if he were difpofed to practife fraud, it might be very eafily practifed; here the fhip waits five hours off the fouth end of the Ifle of *Poehl;* the mafter being afked why he did not weigh anchor and depart when he faw the foldiers approaching, faid that the wind was fair to go in, but not to come out. But the difficulty is, how to fay, in the words of the warranty, that the fhip was within the port; if fhe were within her unloading ground, that would be a ftrong ground to fay fhe was within the port, though not literally; but here fhe is four miles from the road, and if four miles will not protect her, I do not fee how five would; nor do I fee how we can fay that the Plaintiff has not a right to recover. Whether the underwriters can form a warranty to meet the mifchief in fome other way, may be confidered; the warranty might be againft any force in or iffuing from the port of difcharge.

Rule difcharged.

1811.

WATERS *v.* REES, one of the Bail of Sir W. MANSELL Bart.

May 22.

If a Plaintiff recover a judgment for money lent, and interest, he cannot therefore require the bail to pay him interest on the amount of the judgment as part of his costs.

SHEPHERD Serjt. moved for a rule that the prothonotary, in taxing costs on the judgment obtained in this cause by the Plaintiff, might be directed to compute interest at 5*l. per cent.* on the sum of 1181*l.* 10*s.*, the amount of a judgment signed the 6th day of *July* 1810, in an action in which the same *Waters* was Plaintiff, and Sir *W. Mansell* Bart. was Defendant, and in which action *Rees* and *T. Waters* did in *Easter* term, 50 *Geo.* 3., enter into a recognizance of bail upon this condition, that if judgment should be given for the Plaintiff against Sir *W. Mansell* in that action, then the said Sir *W. Mansell* should satisfy all such damages which should be adjudged to the Plaintiff against him, or should render his body on that occasion to the prison of the *Fleet*: he prayed for this interest to be computed from 6th *July* 1810 to 14th *May* 1811, when the sum of 1181*l.* was paid to the Plaintiff in part satisfaction of his judgment against Sir *W. Mansell*, and that the Plaintiff might be at liberty to sue out execution against *Rees* for what was then remaining due on the said judgment against Sir *W. Mansell*, and for such interest, and costs so to be computed and taxed, and for sheriff's poundage, costs of levy, and all other incidental expences. The circumstances stated were, the action was *assumpsit* for money lent and interest thereon, the Plaintiff issued a writ of *capias ad satisfaciendum* against the principal, but being unable to take him, he proceeded in *Michaelmas* term against the bail.

Lens Serjt. shewed cause against this rule in the first instance. This is a novel attempt, and does not come within

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within the terms of the recognizance. For it is plain that the Plaintiff never did or could recover this interest against the principal in this action, whatever he might do in a new action upon the judgment, but it is only in this action that these bail are liable. It would be peculiarly hard to subject the bail to this burthen in the present case, because their principal, by leaving the realm, has put it out of their power to surrender him.

MANSFIELD C. J. (after enquiry made of the officers). We have never known any instances of this having been granted, which is a sufficient answer to the present application: we ought not to load the bail with more liabilities than they at present incur.

Rule refused.

May 24.

GOULD and Others, Administrators of ROBINSON v. BARNES.

If a person enter into a bond by a wrong *Christian* name, and be sued on such bond, he should be sued by such name. A declaration against him by his right name, stating that he, by the wrong name, executed the bond, is bad.

THE Defendant, *Joseph Barnes*, entered into a bond to *Robinson* by the name of *Thomas Barnes*; throughout the bond he was called *Thomas*. In debt on this bond, the Defendant was sued by his real name *Joseph*, and the declaration stated that he, "by the name and description of *Thomas Barnes*, of &c., by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound," &c. The Defendant pleaded *non est factum*. At the trial of the cause before *Lawrence* J. in *Guildhall*, at the adjourned sittings after *Hilary* term, *Best* Serjt., for the Defendant, contended, that upon this declaration the Plaintiff ought to be nonsuited; *Lawrence* J. however permitted the

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Plaintiff to take a verdict, and faid, that as the objection was on the record, the Defendant might move in arreft of judgment if he fhould think fit. A rule *nifi* for that purpofe was applied for and obtained on a former day; and in fupport of the application *Hyckman* v. *Shotbolt*, *Dyer* 279. *b.*, and *Field* v. *Winlow*, *Cro. Eliz.* 897., were cited.

On this day *Vaughan* Serjt. fhewed caufe againft the rule.

LAWRENCE J. Is not the cafe of *Clarke* v. *Iftead*, in error, *Lutw.* 894. directly to the point? Is there any thing in this?

Vaughan Serjt. admitted, that if the Defendant had been fued by the name of *Thomas*, and had pleaded in abatement that his name was *Jofeph*, he would have been eftopped by the bond; but contended that the fheriff could (*a*) not have executed final procefs againft him by the name of *Thomas* without being a trefpaffer.

CHAMBRE J. If the Defendant had pleaded in abatement, it might have been replied, that he was known as well by the one name as the other, and the bond would have been evidence of it.

Rule abfolute (*b*).

(*a*) *Sed vide* 1 *Roll.* 869. *l.* 50., and *Rock* v. *Leighton*, 1 *Salk.* 310.

(*b*) *Acc. Gilb. H. P. C.* 216. 217.

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May 24.

Doe, on the Demise of Ledger, v. Roe.

The Court will not set aside a judgment and execution in ejectment in order to let in a person to defend, though he make an affidavit setting forth a clear title, and offer to pay costs.

VAUGHAN Serjt. moved that the judgment and execution in this case might be set aside on payment of costs, and that one *Palethorpe* might be let in to defend: and grounded his motion on an affidavit made by *Palethorpe*, wherein he swore that the premises descended from his grandfather to his father, and from his father to him, subject to the payment of 5*s*. to the churchwardens, by whom this action was brought; that the churchwardens had brought several other ejectments, and had never proceeded beyond declaration, and that therefore, when this was served, he thought it would be as usual, and did not instruct his attorney. The Court however said that if *Palethorpe* had a good title he might bring his ejectment.

Rule refused.

May 24.

Feise and Another v. Aguilar. (a)

If a *British* subject has an interest in any part of a cargo, on a valued policy, he may recover to the extent of the policy on a count averring interest in himself, if he proves some interest, although alien enemies may be interested in other parts of the cargo.

THIS was an action upon a policy of insurance upon goods, valued at 19,000*l*. Several persons had contributed to form this cargo, respectively becoming partners with the Plaintiffs in various assortments of goods which those persons chose. The Plaintiffs were interested in the proportion of four parts in nine of the whole, and the other persons, some of whom were alien enemies, were interested in the other five parts: the

(*a*) See *Fayle* v. *Bourdillon*, and *Feise* v. *Bell*, *post.*, vol. 4. the last case in this term, *post.*, p. 4.

Plain-

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Plaintiffs had written inſtructions to their broker to inſure four parts in nine for the account of the Plaintiffs and others; but there was no evidence that any others than the Plaintiffs had acquired any intereſt in thoſe four parts. The Plaintiffs obtained a verdict upon a count in which they had laid the intereſt in themſelves.

Lens Serjt. had obtained a rule *niſi* to ſet aſide this verdict, upon the ground that in this count the intereſt was not duly alleged, for that the 19,000*l.* was intended to cover the whole cargo, and therefore the intereſt ought to have been laid in all the perſons intereſted. Upon the other counts the queſtion of alien enemy aroſe, whoſe intereſt was not protected by a licence to *Feiſe* and Co., on behalf of themſelves and others.

Shepherd and *Beſt* Serjts. ſhewed cauſe, and *Lens* and *Vaughan* Serjts. endeavoured to ſupport the rule.

MANSFIELD C. J. Suppoſe other perſons beſides the Plaintiffs were intereſted, yet if the Plaintiffs were intereſted (*a*), is not that ſufficient in the caſe of a valued policy? It has been held again and again, that it is unneceſſary to prove the amount of intereſt under a valued policy. Therefore we muſt take it that the value inſured is the value of the Plaintiffs' intereſt.

HEATH J. This objection certainly was not ſtarted at the trial; no doubt it appeared that others were intereſted in the other five parts, but *Feiſe* and *Fannius*

(*a*) See the caſe of *Cohen* v. *Hannam*, 5 *July*, *Trinity* term, 1813, *poſt.*, vol. 5.

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had a feveral intereft in the four parts; the purport of the inftructions to the broker were, to infure, as to thofe four parts, for their account, and the account of others who *may* intereft themfelves, *i. e.* in thofe four parts. It was competent for the Plaintiffs to infure their feparate intereft, as it was competent for others to choofe whether they would infure their's or not. The Defendant ought to have fhewn that others did acquire an intereft in thofe four parts, before he could raife this objection.

Lens admitted that both anfwers were decifive, and, without going into the conftruction of the licence, the

Rule was difcharged.

May 24.

GOLDSCHMIDT v. WHITMORE.

A fentence condemning as enemy's property a cargo, which the mafter had barratroufly carried into an enemy's blockaded port, although it may be conclufive evidence that the cargo was enemy's property at the time of capture and condemnation, does not difprove the allegation that the cargo was loft by the captain's barratroufly carrying the cargo to places unknown, whereby the goods became liable to and were confifcated.

THIS was an action upon a policy of infurance at and from *Hamburgh* to any port in the United Kingdom, on goods as intereft might appear: in cafe of capture, feizure, or detention by any power whatfoever, the underwriters were to pay the lofs within 2 months. Upon the trial of the caufe, at the fittings after *Hilary* term 1811, before *Mansfield* C. J., it appeared that the veffel *Anna Catherina*, on board of which were the goods infured, and which were jointly the property of the Plaintiff and of certain *Hamburghers*, failed from *Hamburgh*, deftined by the affured for a port in *England*, but that the mafter barratroufly fhaped his courfe for a

blockaded

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blockaded port in *Holland*, and being taken by an *English* cruizer, was libelled in the *English* court of admiralty, and condemned "as belonging to the enemies of our lord the king, or otherwise liable to confiscation." The Plaintiff had averred the loss to be, that "the master of the ship, in a barratrous and fraudulent manner, took and carried the said ship or vessel, with the said goods on board, to places to the Plaintiff unknown, by means whereof the goods became and were subject to capture, seizure, and confiscation, and were accordingly captured, seized, and confiscated, and wholly lost to the Plaintiff and the other persons interested." After verdict for the Plaintiff,

Lens Serjt. in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit upon two grounds: first, that the licence which had been produced at the trial, (the terms of which it becomes unnecessary to state on account of the ultimate decision of the Court on that point,) having expired, was insufficient to legalize the adventure; secondly, that it having been decreed by a Court of competent jurisdiction, that the goods in question were enemy's property, the sentence was conclusive evidence on that point, and therefore the Plaintiff could not recover upon an insurance of hostile property.

Shepherd and *Best* Serjts. on this day shewed cause. They contended on the first point, that at the time of this adventure, which was in *July* 1810, *Hamburgh* not being then an hostile port, a consignment from that country to this was a legal adventure; for although *Hamburgh* was a port from which the *British* flag was then excluded, and therefore an adventure from that port to another port from which the *British* flag was excluded would have been liable to confiscation under

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the *British* orders in council, yet there was in the order in council of the 11th of *November* 1807, in the 6th article, (1 *Edw. part* 1. *Appendix*) an exception in favour of "any vessel, or the cargo of any vessel belonging to any country not at war with his majesty, which should be coming from any port or place in *Europe* which was declared by that order to be subject to the restrictions incident to a state of blockade, destined to some port or place in *Europe* belonging to his majesty, and which should be on her voyage direct thereto." Nothing therefore in the *English* municipal law took this adventure out of the general condition of neutral states, which, by the law of nations, may lawfully trade with a belligerent. With respect to the second point, he suggested that the Plaintiffs, who claimed the cargo in the prize court, and who completely satisfied that Court as well as the jury that they were innocent of the intention of going to *Holland*, prayed that Court to alter the terms of the sentence, upon the ground now objected, that it would discharge the underwriters, by furnishing them with conclusive evidence that the cargo was enemy's property; but the learned Judge who presided in that court, answered their doubt by saying that it was only evidence that the cargo was enemy's property at the time of condemnation, but not that it was such when the risk attached. And the fact was truly so; for the circumstance that constituted the goods to be enemy's property was the master's barratrously taking the ship into an hostile port, which is one of the risks insured against, and her being enemy's property is only the consequence of the loss which happened by a risk insured. *Earl* v. *Rowcroft*, 8 *East*, 126. A loss by condemnation for trading with an enemy was held to be a loss by barratry: the terms of that sentence must have been similar to this.

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Lens and *Vaughan* Serjts. in support of the rule. Up to the present day it is the practice for those who are in the *Hamburgh* trade to obtain licences, and the practice is much stronger evidence of the necessity of a licence than the superficial research which counsel can make into these numerous and complicated orders of council for the purpose of a single cause, is of its being unnecessary. From the circumstance that it was necessary for the vessel at that time to take out from *Hamburgh* a fictitious clearance for *Holland*, it may be considered that *Hamburgh* was then in a state of war with this country. As to the second point, the sentence being conclusive evidence of all the facts which it affects to decide, is, according to the authorities of *Bolton* v. *Gladstone*, *ante*, 2. 85., *Pollard* v. *Bell*, 8 *T. R.* 434., *Lothian* v. *Henderson*, 3 *Bos.* & *Pull.* 499., *Kindersley* v. *Chace*, 2 *Park*, 6 *ed.* 485., conclusive evidence that the goods were enemy's property. It is not competent for this Court to enquire how they became such. It is merely a verbal criticism to say that the goods were enemy's property at one period, but not at another, and it cannot avail the Plaintiffs. In *Earl* v. *Rowcroft* it may presumed that the sentence of condemnation, which is not before the Court, was for contraband trading: in this case, for any thing that appears, as the proceedings in the court of admiralty are not all before this Court, there may have been, and it must be presumed that there was, an allegation of her being hostile property to warrant the terms of this sentence. The sentence makes it hostile property not for one purpose only, but all the conclusions and consequences of its being hostile must follow. [They prayed that the case might be again argued by civilians, but the Court thought it was wholly unnecessary.]

MANSFIELD C. J., after reading the allegation of the loss, asked whether the evidence which sustained it, did

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not alfo prove that the act of the mafter made the goods to be loft, call it enemy's property, or call it what you will? How does the fentence fubfequently pronounced affect the cafe? I do not at prefent think this falls within the cafes of fentences being conclufive; but fuppofing it to be conclufive, I do not fee how it helps the Defendant. It is the mafter's barratrous act in carrying the veffel near the enemy's coaft, that makes it enemy's property, *quoad* this captain, it is enemy's property, but it is his act that makes it fuch; it is equally loft to the owner by the captain's act, whether it be by his making it enemy's property, or by other mifconduct. It would be ftrange to fay that the underwriters fhould be difcharged, when it is the barratrous act of the captain that caufes the lofs.

LAWRENCE J. We do not gainfay the fentence at all; it may be enemy's property, but it was the captain's barratrous act that made it fo.

HEATH J. That is the plain and intelligible ground to put it on.

Rule difcharged.

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(IN THE EXCHEQUER-CHAMBER.)

COUSINS *v.* NANTES and Another. In Error.

May 25.

A wagering policy and a policy on intereſt, are contracts diſtinct in their nature and incidents.

It muſt appear on the face of the policy of which ſpecies the contract is.

If the policy be in the common form, it is a policy on intereſt.

If it be a policy on intereſt, the declaration muſt aver in whom the intereſt is veſted.

THE Plaintiff below declared upon a policy whereby the Plaintiff below and *R. M. French* did (as well in their own name, as for and in the name and names of all and every other perſon or perſons to whom the ſame did, might, or ſhould appertain, in part or in all, cauſe themſelves and them and every of them to be inſured, loſt or not loſt, at and from *Elſineur* to *Ferrol*, *Cadiz*, and *Carthagena*, upon the ſhip called the *Hoop*, valued at 1460*l*. The Plaintiff averred, amongſt other matters, that the ſhip *Hoop* was not at the time of effecting the policy, or at the time of the happening of the loſs thereinafter mentioned, or at any other time whatſoever, the property of, nor belonging to his majeſty the king of *Great Britain*, or of any of his ſubjects. And that the Plaintiff below, together with *R. M. French*, were the perſons who gave the orders to the agent immediately employed to effect that policy, and alleged a loſs by arreſt by order of his majeſty, and condemnation in the court of admiralty. The Defendant below demurred, and aſſigned for cauſes, that it was not alleged, nor did it appear by the firſt count of the declaration, for whoſe uſe or benefit, or on whoſe account, the policy was made, and alſo for that it was not therein alleged to whom the ſhip in that count mentioned did appertain in part or in all, or what perſon or perſons were intereſted or concerned in the inſurance effected thereon by that policy: and alſo for that it was not alleged, nor did it appear, that the aſſureds, or either of them, or any other perſon or perſons whatſoever, had any intereſt, property, or concern in the ſhip or inſurance; and alſo that it was alleged

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alleged that the ſhip became wholly loſt to the aſſureds, and to every other perſon to whom the ſame did or might appertain in part or in all; but it was not alleged, nor did it appear with ſufficient certainty by the declaration, to whom, or to what other perſon or perſons beſides the aſſureds, the ſhip became wholly loſt, and that it appeared by the declaration that the action in that reſpect was brought for the uſe of the Plaintiff below as the ſurvivor of *R. M. French*, and alſo of every other perſon to whom the ſhip did or might appertain in part or in all, but it was not alleged, nor did it appear by the declaration, and with ſufficient certainty, to how many and what other perſons the ſhip did appertain in part or in all. The Court of King's Bench in *Eaſter* term 1802 gave judgment upon this demurrer for the Plaintiff below. See *Nantes* v. *Thompſon*, 2 *Eaſt*, 385.

The Defendant below brought error, and aſſigned the general error; and the caſe was thrice argued, twice before the reporter began to take notes in this court, viz. the firſt time by *Giles* for the Plaintiff in error, and *Puller* for the Defendant in error, in *Hilary* term 1804; the ſecond time by *Gibbs* for the Plaintiff in error, and *Park* for the Defendant in error, in the *Eaſter* term following. The judgment ſtood over, as it was underſtood, until the deciſion of the Houſe of Lords in the caſe of *Lucena* v. *Crawfurd*, on the firſt writ of error: 2 *New Rep.* 269. A third argument was in *Trinity* term 1809 directed by the Court: and the caſe was in *Michaelmas* term 1809 argued by

R. Carr for the Plaintiff in error; who ſtated that the Defendant in error had on the former arguments made two points; firſt, that it was lawful at common law to effect an inſurance without intereſt; ſecondly, that ſince the ſtatute 19 *Geo.* 2. *c.* 37. it was not neceſ-

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ſary to avēr an intereſt. *Carr* combated the firſt propoſition, and mainly relied upon the judgment given by Lord *Eldon*, Lord *Ellenborough* C. J., and Lord *Erſkine* Chancellor, in the caſe of *Lucena* v. *Crawfurd*, 2 *New Rep.* 315. He alſo referred to *Depaiba* v. *Ludlow*, *Com. Rep.* 260. [The Court, after directing the counſel to withdraw, declared, that the only queſtion in *Lucena* v. *Crawfurd* was, whether the count, which was penned in a peculiar way, contained ſuch an averment of intereſt as would ſupport the judgment of the court below; therefore the judgment on the principal point in that caſe did not at all affect the preſent queſtion, but that the Court conſidered it to have been by that caſe ſolemnly determined, without even a difference of opinion among the Judges, that at common law, wager policies, or inſurances without intereſt, were lawful; and that it was impoſſible to ſay that any wager which was not, (as it was ſaid), contrary to the policy of the law, that is, contrary to morality, or hurtful in a political point of view, was not a legal contract. Therefore the argument for the Plaintiff in error might be confined to the ſecond point, that the perſons to whom the intereſt belonged, ſhould appear on the policy.] *Carr* then contended that the declaration was bad, becauſe the contract, which it was intended to deſcribe, was a policy upon an intereſt, and that being ſo, it was neceſſary that the Plaintiff ſhould ſtate upon the face of his declaration where that intereſt reſided. If he had meant this inſurance to be an inſurance without intereſt, he ſhould have ſo deſcribed it in his contract. But this policy neither contains words diſpenſing with the proof of intereſt, nor averring that the aſſured had no intereſt, nor averring that the ſhip is a foreign ſhip. It muſt therefore be taken to be an inſurance on intereſt, which is the moſt ordinary claſs of inſurances. All writers define an inſurance as a contract of indemnity: every inſurance muſt

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therefore be presumed to be such unless expressly distinguished. In the case of *Nantes* v. *Thompson*, it was proposed to avoid the difficulty by inserting in policies the words "on interest;" but that expedient was never yet practised. If, therefore, every policy made in the common form is and purports to be an insurance on interest, the assured under such a policy would, if he had no interest, be entitled to a return of premium, as well before as since the statute 19 *G.* 2. *c.* 37. There is no other ground upon which a return of premium in such a case can be accounted for; but it appears from the cases, that before that statute a Plaintiff was entitled, on failure of interest, to a return of premium, which could not have been, if his policy described an insurance without interest. *Martin* v. *Sitwell*, 1 *Sho.* 156. [*Mansfield* C. J. Upon an insurance made on "interest or no interest," the premium cannot be recovered back on account of the want of interest, because the question of interest has nothing to do with it. No doubt, if a policy purports to be made upon an interest, and it turns out that no interest exists, that policy is void, and the premium must be recovered back.] If this were otherwise, it would have been wholly unnecessary, before the statute, to have averred an interest, yet all the precedents, before the statute, either contain a dispensation of the proof of interest, or aver interest; and since the statute they have uniformly averred it on policies on foreign ships, until the declaration in *Crawfurd* v. *Hunter*, which was the first instance to the contrary. *Goram* v. *Sweeting*, 2 *Saund.* 200., which was relied on as an instance to the contrary, has a stipulation that the ship should be "valued at 300*l.* without any further "account to be rendered for the same," which means without further account of interest." *Vidian*, 26. & 48. *Precedents in Upper Bench*, 1653. A manuscript precedent of Serjeant *Poole's*. *Goslin* v. *Thorpe* in 1741. *Blake* v. *Dun-*

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v. *Duncalfe* in 1731, *ibid.* and several other manuscript precedents, are cited in *Crawfurd* v. *Hunter*, 8 *T. R.* 18. The adjudged cases are, *Goddard* v. *Garrett*, 2 *Vern.* 269. which was a bill to have a policy delivered up, upon the ground that the assured had no interest in the ship or cargo. The Court said, the law is settled, that if a man has no interest, and insures, the insurance is void, although it be expressed in the policy, "interested, or not interested." This shews the necessity of the averment, for though a policy without interest was a contract to which the law would give effect, it was one which the courts of equity would not permit to be enforced. [*Mansfield* C. J. The Courts of equity formerly exercised an odd jurisdiction upon this subject; but they could not have proceeded upon the ground that an agreement was good on one side of *Westminster-hall*, and not on the other.] Lord *Eldon*, in his judgment, refers to *Depaiba* v. *Ludlow*, and other cases, where it is said, that the effect of the act was merely to change the form of the policy. Lord *Eldon* considers that those words affected merely the proof, and not the legality of the contract. [*Mansfield* C. J. It is a part of the contract if the insurance be, "interest or no interest:" it has nothing to do with the proof: Lord *Eldon* states, that if the insurer having admitted an interest which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a court of equity that he had been taken by surprize in his admission, and the policy would be ordered to be delivered up. He is contemplating policies which are good at law; but how that could be done except upon cases of fraud, or other external circumstances, I am at a loss to conceive, except in a few cases where the Defendant's proof might have been lost.] If it be not a policy upon interest, there can be no partial loss, no abandonment, no return of premium. If it be a policy upon interest, it is necessary to aver and to

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prove in whom that intereſt is veſted, and a variance therein is fatal. The ſtatute ſays nothing reſpecting the averment of intereſt, it only ſays that policies containing certain words, intereſt or no intereſt, ſhall be void. The argument would go to this length, that it was abſolutely unneceſſary to aver intereſt in declaring on any policy before the ſtatute, and on any policy on a foreign ſhip ſince. If a man having no intereſt makes a policy in the common form, without apprizing the aſſured that he has no intereſt, he commits a fraud, by perſuading the other to enter into a contract poſſeſſing incidents which do not belong to his real ſituation.

Puller, for the Defendant in error. The queſtion, as now narrowed, is merely this, whether ſince the ſtatute 19 *G.* 2. *c.* 37. a policy can be effected on a foreign ſhip without notifying to the underwriters that the ſhip is foreign? For ſince wagering policies were legal before that ſtatute, and ſince that ſtatute leaves the caſe of foreign veſſels untouched, it is impoſſible that it ſhould render a new averment neceſſary with reſpect to them, which was not neceſſary before. [*Mansfield* C. J. That is not contended for, but that it was always neceſſary to ſtate ſomething on the face of the contract to ſhew that it was a wagering policy.] In *Lucena* v. *Crawfurd* moſt of the Judges ſaid, (p. 308.) that before the ſtatute it had been moſt uſual to aver intereſt, but that precedents without it were to be found, and that ſuch an averment was not eſſential to maintain a declaration upon the policy; it was ſufficient to ſhew in the caſe of a policy upon intereſt, that a real loſs had been *bonâ fide* ſuſtained. [*Mansfield* C. J. They were there ſpeaking of a common policy.] If on a common policy it was not neceſſary before the ſtatute, there is no reaſon why it ſhould be neceſſary in this caſe, which by the particular

cular form of the averment is made still stronger than the ordinary case. Lord *Eldon* says, that in the case of a foreign ship the averment of interest is dispensed with on account of the difficulty of proof. But this judgment in *Lucena* v. *Crawfurd* would deliver the Defendant in error from the necessity of such an averment, even if this were not a foreign ship. *Martin* v. *Sitwell* appears to have been an insurance on goods, and there were no goods put on board, so that the policy never attached. In *Goram* v. *Sweeting* there is no averment of interest, nor does "account" mean proof of interest, but proof of value, and as *Grose* J. observed in *Nantes* v. *Thompson*, 2 *East* 392., "that could not, according to any rule of pleading, dispense with the necessity of averring an interest, if without such averment there could be no breach of the Defendant's undertaking." The only allegation in *Goram* v. *Sweeting*, from which interest could be inferred, is, that the ship was lost, and that the Plaintiff abandoned *totum interesse suum*. But if this were introduced as an averment of interest, it would be clearly demurrable. It is held in *Lucena* v. *Crawfurd*, that an allegation of interest is unnecessary. In *Clift. Ent.* 77. is a declaration without any allegation of interest: it is quite clear the statute did not make any new averment necessary, for it only prohibited that which had been usual before, and excepted out of the prohibition the case of foreign ships. The Court of King's Bench said, "every man can ask whether the ship he insures is foreign or *English*." Is it to be presumed, when I state on my count that the ship is not *English*, that it was not disclosed to the underwriters that she was foreign? [*Mansfield* C. J. The objection is not, that the interest is not alleged in the declaration, for enough is said there to shew that the Plaintiff meant to avail himself of her being a foreign ship; but it is contended that it must be shewn on the policy, whether

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ſhe was a foreign or *Engliſh* ſhip.] None of the policies ſtated in any of the precedents of declarations, notice the ſhip as being foreign, nor do they notice any part of ſuch a contract as might diſpenſe with it. If then, before the ſtatute, intereſt or want of intereſt was not diſtinguiſhable on the policy, then this, which is the excepted caſe of a foreign ſhip, muſt now ſtand on the ſame ground as all caſes did before the ſtatute. [*Heath* J. Why may not you inſure a foreign ſhip, intereſt or no intereſt, and refer it to the event to ſee in what manner you ſhall declare, and what ſhall be the relative rights ariſing out of the policy?] The contract would be binding on the parties to adopt the ſituation in which they ſtood at the time of making the contract, with all its incidents. [*Mansfield* C. J. Nothing is ſaid in the ſtatute about the form of the policy, nor about the averment of intereſt. The only uſe of an averment of intereſt is, to inform the Defendant with ſufficient certainty, in whom the Plaintiff means to inſiſt that the intereſt is. It is equally a valid and legal contract, in whomſoever the intereſt may appear: it is a mere queſtion of form: nothing ariſes here on defect of evidence. *Wood* B. It is all reducible to this; if the nature of the contract includes a warranty that the aſſured has an intereſt, then intereſt muſt be averred in the declaration.] The majority of the Judges decided that the ſtatute of *Geo.* 2. only prohibits forming a contract to diſpenſe with proof of intereſt at the trial. If it was neceſſary for the Plaintiff below to prove intereſt at the trial, and if he failed to do it, the objection was to the verdict, then; but it does not neceſſarily follow that becauſe the Plaintiff below did not then prove intereſt, it is therefore a good objection now, that he did not aver it. This averment authorized him to prove at the trial that the ſhip neither belonged to his majeſty nor to any of his ſubjects, therefore it muſt neceſſarily

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have been foreign. [*Mansfield* C. J. Looking at this policy, I think there is great weight in what the counsel for the Defendant in error has urged, that in *Lucena* v. *Crawfurd* the Judges held that an averment of interest was unnecessary. For what are the words of the policy? He causes *himself* to be insured; it imports the thing insured to be his, otherwise how can *he* be insured, except in wager policies? This then is only necessary to be proved at the trial: if it be not proved at the trial that there is a real interest, there must be a nonsuit; but that does not touch the question whether an averment of interest is necessary.]

Carr in reply. The argument of the Plaintiff in error has been misunderstood. It is this, that if the Plaintiff below meant to insist upon an insurance without interest, he must shew it on the policy. [*Mansfield* C. J. You urge, and with truth, that a policy in the common form is a contract of indemnity, as in form it is: if so, and inasmuch as every contract of indemnity is a contract founded on interest, in stating that contract the interest appears; and why is it necessary to allege it again? If the Plaintiff does not prove his interest at trial, he is gone, but it is unnecessary to aver the interest twice. The question certainly goes to this, whether it is in any case necessary to aver interest even in a *British* ship.] The whole practice, since the statute, is contrary to that proposition, though two or three precedents may be found before it, without an allegation of interest, or dispensation of it; but *Goram* v. *Sweeting* is not one of them. It is equally necessary for the Defendant to be told in whom the interest will be contended to be, as for him to know whether any interest exists. It is not necessary that all policies upon foreign ships should be with interest or no interest, but if it is meant for a gaming policy, let the parties declare it; if for a

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contract of indemnity, let that purpofe be expreffed. [*Mansfield* C. J. The argument has mixed a great deal with the neceffity of the averment of intereft before the ftatute; but the fingle queftion here is, whether it was neceffary to fhew on the policy that this was a gaming policy.]

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the judgment of the Court.

It was impoffible for the Court below to decide this cafe otherwife than they did while their decifion in *Crawfurd* v. *Hunter* ftood. The fingle queftion is, whether on a policy, fuch as this is, the averment contained in this declaration is fufficient to maintain the action? The policy is in the common form, without any thing in it leading any one to fuppofe that it was otherwife than an ordinary policy. It is alleged that the fhip became wholly loft to every perfon interefted, but there is no allegation of intereft in any perfon in the declaration. The authority of *Crawfurd* v. *Hunter* has been much fhaken fince; in the cafe of *Crawfurd* v. *Lucena*, the verdict was taken in fuch a way as not to include the count in which no intereft was alleged; counfel of great eminence avoided it, which fhews they thought it doubtful. The cafe of *Goram* v. *Sweeting* in *Saunders* was much talked of, and there is in the declaration in that cafe no averment of intereft: *Saunders* was counfel for the Defendant, and was aftute enough to have taken the objection if it had been tenable. Some entries are to be found, without any allegation of intereft; but thofe found with it are ftronger authorities; for no one would incumber himfelf with fuch allegation if he could avoid it. Wager policies at laft came to be legal, nobody knows how, contrary to common fenfe; at moft it only proves the opinion of the perfons then in the habit

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habit of drawing declarations, who were not, as now, counsel in the causes, but officers of the court, viz. the prothonotaries of the Court of Common Pleas; one cannot see why such an allegation should find its way into a declaration, unless necessary. With respect to the true nature of the contract of indemnity, it has been argued, that if there be no interest, no loss can happen; every word in the policy shews that it was an instrument to protect merchants; the words at the beginning of the declaration are, "according to the usage and custom of merchants;" it is not the usage and custom of merchants to gamble. If this be so, every policy must be taken to be on interest, unless something be stated, shewing the contrary. In this policy, there is nothing shewing that it was not on interest. If it be admitted, as it is, that interest must be proved at the trial, it must be alleged also, that the Defendant may be prepared at the trial to meet it. This policy must be taken to be on interest; to support an action on a wagering policy, something must appear to shew that it is such. The preamble of the statute 19 *G.* 2. *c.* 37. recites, that the making assurances, interest or no interest, or without further proof of interest than the policy, had been found pernicious, from whence it seems as if, before that act, all policies were on interest or no interest, or without further proof of interest than the policy: it is true that the act goes on, when enacting, to use the same words, and adds, "or by way of gaming or wagering, or without benefit of salvage to the assurer." The language of this act seems strongly to prove, that before it passed it was usual to put in policies the words "interest or no interest," or some other words, in order to shew that it was a wagering policy; and to be sure, unless there were words to distinguish wagering from other policies, there would be a great disadvantage to the underwriters. On a wager-

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ing policy, there is no salvage, no abandonment, no return of premium for short interest; it is the interest of the insured that the ship should be lost; but it is the contrary on a policy on interest; there is salvage, there is an abandonment, there is a return of premium for short interest; there it is usually the interest of the merchant to labour for the safety of the vessel. Consequently it is absolutely necessary, in order to give the underwriter a fair advantage, that he should know it is a wagering policy. *In this declaration it is alleged, that the ship did not belong to the king, or any of his subjects: this was intended to supply the necessity of words, tending to shew it was a wagering policy. But it is not enough to shew these circumstances in the declaration; if they are not shewn in the contract, it is necessary that it should be inserted in the contract whether the policy is a wagering policy or not. This, then, is not a wagering policy, but an ordinary policy, made for the purpose of indemnifying the person insured, and there is no declaration upon such a policy in any case since the statute 19 *G.* 2. *c.* 37. of which I am aware, except that of *Crawfurd* v. *Hunter*, wherein the allegation of interest has been omitted. Upon such a policy, therefore, we are of opinion, according to the practice of 60 years, since the statute, that it is necessary to allege the interest in the declaration, in order that the Defendant may see what that interest is, and in whom it is; for it is very necessary that the Plaintiff should know what interest is intended to be relied on, because he may, by disproving it, in many cases defeat the action. We therefore think, that on this declaration, the Plaintiff in the Court below ought not to have recovered.

Judgment reversed.

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SHERBORNE *v.* SIFFKIN. May 26.

Action for freight, and cross-action for unliquidated damages against a foreign seaman. The Court refused to permit the freight to be paid into court, as a fund liable to payment of the damages when ascertained.

THE Defendant, who was a foreign mariner, having sued the Plaintiff for freight, and the Plaintiff having commenced the present action against the Defendant for damage occasioned to the cargo to a much greater extent than the amount of the freight;

Best Serjt. moved that the Plaintiff might pay the freight into court, there to be impounded, and to go towards the damages which the Plaintiff might recover in the present action. It was not legally a matter of set-off, and it was feared the Defendant would obtain judgment for the freight before the Plaintiff could obtain judgment for the damages, and would levy it, and leave this country.

The Court held, that if the Defendant had a right to recover, he had a right to receive his money, and refused to interfere.

Rule refused.

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May 27.

Howard *v.* Ramsbottom, Assignee of George.

The notice of intention to dispute a bankruptcy, required by stat. 49 *G.* 3. *c.* 121. *s.* 10. may be served on the assignee by delivery to his attorney.

But service by leaving the notice with a maid-servant at the dwelling-house of the assignee is not sufficient service.

THIS was an action of trover. Upon the trial of the cause at the sittings after *Michaelmas* term 1810, before *Mansfield* C. J., the defence was, that the Defendant was the assignee of the effects of the Plaintiff, who had also been declared a bankrupt, as well as of *George*. To meet this defence, the Plaintiff attempted to contest his own bankruptcy, as well immediately, by shewing that the commission, which had been sued out upon the petition of the Defendant, as assignee of *George*, for a debt of 100*l.* sworn to have been due from the Plaintiff to *George*, could not be supported, because that debt did not exist; as mediately, by impugning the commission issued against *George*, in order to shew that whatever rights *George* might have, they had not been duly transferred to the Defendant. The Defendant, however, insisted, that as the Plaintiff had given him no notice of his intention to contest the bankruptcy of *George*, he could not be now permitted to impugn that commission. It was proved, that a twofold notice of the Plaintiff's intention to dispute the commission against himself had been given; first, by service, whether before or after the time of issue joined did not appear, of a notice to the Defendant at the Defendant's house, delivered to a maid servant, the Defendant not being then at home; but the Plaintiff did not prove that the notice did, and the Defendant did not prove that it did not, come to the Defendant's hands: secondly, by a like notice served upon the Defendant's attorney, long after issue joined, a few days only before the trial. The debt upon which the commission against *Howard* had issued, was sworn by *George* at the trial to have been 60*l.* of

George's

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George's own money, furnished by him to the Plaintiff, to enable the Plaintiff to go out on a journey, and 40*l.* expended by himself on another journey, for the Plaintiff's benefit. The Plaintiff and *George* had been partners in various transactions. They took these journies for the purpose of purchasing goods of unwary persons, for which they never paid, but resold them, and converted the money to their own use. It appeared that before the time when this sum was said to have been paid by *George*, the commission had issued against him. *Mansfield* C. J. thought it utterly incredible that he had advanced this money separately, and not as partnership stock. It was objected for the Defendant, that the Plaintiff's notice of intention to dispute his bankruptcy, ought to have been served on the Defendant in person; but no objection was taken at the trial, as to the time when the notices were served, with reference to the time of issue joined. The jury found a verdict for the Plaintiff, subject to the point reserved, whether the manner of service of the notices were sufficient.

Shepherd Serjt. accordingly in *Hilary* term moved for a rule *nisi* to set aside the verdict and enter a nonsuit, as well on the ground that the manner, as that the time of service of the notice being irregular, the Plaintiff was precluded by the statute 49 *G.* 3. *c.*121. *s.*10. from contesting his own bankruptcy, and also upon the ground that the debt due to the petitioning creditor for the Plaintiff's commission, was well proved; for that the money was paid after *George*'s bankruptcy, and therefore was at that time the money of his assignee, subject only to an account with the partnership. The Court said, that the objection to the time of serving the notice not having been taken at the trial, the Defendant could not now avail himself of it, but granted a rule *nisi* upon the other two grounds.

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Best and *Marshall* Serjts. in this term shewed cause. The Plaintiff shewed a *primâ facie* title. The Defendant endeavoured to shelter himself under the title of *George*; it was therefore incumbent on him to prove that *George* had possessed rights which had vested in him, which he failed to do, for the evidence of *George* was incredible. There was no proof of the debt due from *George* to the Defendant, upon which the commission against *George* issued. With respect to the service of the notice, the act of 49 *G.* 3. *c.* 121. does not require personal service; the words are, "that the Plaintiff shall, before issue joined, give notice in writing to such assignee." Where the law requires service of a notice, service at the dwelling-house has been held sufficient. By Lord *Kenyon* C. J. *Jones on demise of Griffiths* v. *Marsh*, 4 *T. R.* 464. It would be attended with so much difficulty, as to be the means of defeating this act, if it were necessary in all cases to serve these notices upon an assignee in person, whose person may not be known to the bankrupt, or who may be in a distant part of the world. A general line of distinction prevails as to notices, that where they are to be followed by a criminal proceeding, the notice must be personal; in all other cases, the notice may be given to the attorney.

Shepherd and *Vaughan* Serjts. *contrà*. It never was put to the jury whether they disbelieved the evidence of *George*. [*Lawrence* J. The 40*l.* expended on journies was never paid to *Howard*, but to various innkeepers and others on the road; to them the assignee of *George* must resort to recover back that part of the sum.] In all cases except one, where any statute requires a notice to be given, it gives some alternative direction. Thus the statute 24 *G.* 2. *c.* 44., requiring notice of action to be given to magistrates, directs that it may be served either on the principal or on his attorney, or

left

left at his usual place of abode. So the statute 23 *G.* 3. *c.* 70, *s.* 29., for protecting excise officers, directs the notice of action to be "delivered to the officer, or "left at his usual place of abode." So the statute 32 *G.* 2. *c.* 28. *s.* 13., for relief of debtors, requires notice to be "given or left unto and for all and "every the creditor and creditors at whose suit the "prisoner stands charged in execution, or his, her, "or their executors or administrators, and at his, her, "or their usual place of abode, or to or for his, her, "her, or their attorney or agent." The statute 2 *G.* 2. *c.* 23. *s.* 23., respecting attornies' bills, requires them to be "delivered to the party or parties to be charged "therewith, or left for him, her, or them, at his, her, "or their dwelling-house or last place of abode." The excepted case is that of 2 *G.* 2. *c.* 22. *s.* 13. directing that notice of set-off "shall be given," without saying to whom it shall be given. The case of *Doe d. Griffith* v. *Marsh* is the case of a notice required at common law, where the Court is to judge of the reasonableness of the notice, but that rule does not apply to the express words of a statute. In the case of *Vincent* v. *Slaymaker*, 12 *East*, 372., Lord *Ellenborough* C. J. thought that a delivery of an attorney's bill to the new attorney of the party sought to be charged, was not a sufficient delivery. And it is observable, that upon all these statutes, except the lords' act, it would usually happen, that at the time when the notice is required to be given, the party entitled to receive it would not have retained any attorney in that transaction to which the notice referred. In *Hill* v. *Humphreys*, 2 *Bos.* & *Pull.* 343. it was held that the leaving an attorney's bill at the Defendant's counting-house was insufficient.

Best replied, that in *Vincent* v. *Slaymaker* the three other Judges held the service sufficient.

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MANSFIELD C. J. The point is very important, as it muſt frequently occur, and the practice ought to be uniform. As to the ſtatute requiring notice of ſet-off, it is perfectly clear how that ſtatute muſt be conſtrued; for the notice is to be given at the time of pleading, therefore it muſt neceſſarily be given to the attorney; and certainly, if nothing in this act confines the notice to be given to the aſſignee perſonally, notice to the attorney is, in point of common ſenſe, much preferable.

Cur. adv. vult.

MANSFIELD C. J. on this day delivered the opinon of the Court.

This act of parliament requires the notice to be given to the aſſignees, and the queſtion is, whether thoſe words intend perſonal notice. In this caſe it appears, that the notice was ſerved in two modes; firſt, by ſerving a. notice upon the Defendant's attorney, and ſecondly, by delivering the notice at the houſe of the Defendant, the aſſignee: reſpecting the latter, a notice left at a man's houſe, with a maid ſervant, may very poſſibly never find its way to the maſter of that houſe; wherefore, if it depended on that only, we certainly ſhould ſay that that ſervice was not ſufficient; but then, the queſtion is, whether the notice given to the attorney is not ſufficient. The act, in its wording, is a good deal like the words of the ſtatute of ſet-off. As to the time of pleading, and joining iſſue, the aſſignee or Defendant himſelf knows nothing: he leaves all that to his attorney. As to all theſe dates, to which both the acts refer, depending, as they do, on the progreſs of the proceedings, the party knows nothing, the attorney is the only perſon who knows; therefore the notice given to the attorney is the beſt notice that can be given for practical uſes; and the

Rule muſt be diſcharged.

1811.

WINTER *v.* MAIR.

May 27.

A broker charters ſhips, at a commiſſion of two and a-half *per cent.* on their outward freight, and the like on homeward freight: if the charter-party makes it contingent what the amount of freight ſhall be, the broker cannot ſue for any ſum till the contingency is determined.

If a junior counſel at *niſi prius* takes a well-founded objection to the Defendant, which his leader gives up, the Court will not entertain it, in diſcuſſing a rule for a new trial or nonſuit on another ground.

THIS was an action of *indebitatus aſſumpſit*, brought by a broker, to recover a recompence for having chartered three veſſels for the Defendant. Upon the trial of the cauſe at *Guildhall*, at the ſittings after *Michaelmas* term 1810, before *Mansfield* C. J., it appeared that by the charter-party the veſſels were to go firſt from *London* to *St. Ubes* for a cargo of ſalt, and thence back to *Sheerneſs*, and thence to *Stockholm*, or ſome port in the *Baltic*, with ſeveral ports of further deſtination, dependent on a market and the diſcretion of the freighter; and in caſe the ſhips ſhould diſcharge their ſalt at *Riga*, and bring home a cargo, and diſcharge it at *Liverpool*, the freight was to be 5000*l.*, and in caſe they ſhould diſcharge the ſalt at certain other ports in the *Baltic*, and bring home and diſcharge a cargo at *Liverpool*, then the freight was to be 4500*l.*, and if they diſcharged their cargoes at *London* or on the *Eaſtern* coaſt of *Great Britain*, the freight was to be four thouſand pounds. The Plaintiff proved by ſeveral witneſſes that it is the practice, that brokers who charter a ſhip outwards, ſhall have the benefit of delivering the ſame ſhip upon her return home, and that the rate according to which they are paid for their ſervices, is, that they receive upon the ſhip's ſailing, two and a-half *per cent.* commiſſion upon the amount of the freight outwards, and upon her return two and a-half *per cent.* more upon the amount of the freight home again. Other witneſſes proved a commiſſion of five *per cent.* upon the freight out and home, half to be paid when ſhe ſails, and half when ſhe returns. But all agreed that the broker was paid by a per centage upon the freight contracted for. The veſſels ſailed and got to *St. Ubes*, and thence back

to

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to *Sheerness*, but had not proceeded further. The jury gave the sum to which the Plaintiff would have entitled himself by this rule, in case the vessels had earned the highest freight covenanted for, under any of the destinations mentioned in the charter-party.

Peckwell Serjt., in *Hilary* term, obtained a rule *nisi* to set aside the verdict and have a new trial, upon the ground that as the amount of freight was contingent in this case, the jury had either taken a wrong rule of damages, or had given a verdict discordant to the rule. If the Plaintiff had made so absurd a contract that the freight could not be calculated, he must abide by the consequences. The Court granted a rule *nisi*.

Shepherd and *Best* Serjts. shewed cause. There is no uncertainty in the rule for calculating the broker's commission. The confusion arises from considering it as dependent on the freight actually earned, whereas it is in truth dependent on the opportunity given of earning freight, the Plaintiff therefore was entitled to his commission upon the highest freight that the parties contemplated. Or if there is any difficulty in ascertaining the amount, at all events he is entitled to the commission upon the lowest of the sums, for the broker's duty is finished as soon as the ship is afloat, and the commission then becomes due. [*Mansfield* C. J. There was no evidence of any broker, that where there were two contingent sums named for freight, the broker was entitled to the commission on the larger sum.] As the voyage was defeated by the act of the Defendant, the Plaintiff is entitled to the largest sum.

Vaughan Serjt., and *Peckwell*, *contrà*. All the witnesses agreed that the amount of the brokerage is to be determined by the amount of the freight contracted

for,

for, and the latter cannot, under this charter-party, be known until the ships return at the end of the voyage. If, therefore, the Plaintiff chose a measure of compensation dependent on a contingency, he must wait until that contingency happens before his commission can be ascertained: consequently this action is prematurely brought. If he had deserted this contract, and gone upon a *quantum meruit*, he might, perhaps, have recovered something, but at the trial he expressly repudiated that claim.

MANSFIELD C. J. It is now too late to contend that the Plaintiff is not entitled to recover something, for that objection was never insisted on at trial. [*Peckwell* said that he made the objection, but his leader, *Cockell* Serjt., abandoned it.]

LAWRENCE J. No special contract was declared upon, but the Plaintiff asks for the measure of damages, according to the rule which he proved at trial, which is to be, according to the freight when ascertained; but that cannot be recovered on until the freight is ascertained. As this point, however, was not insisted on at the trial, the Defendant is not now entitled to a nonsuit.

The Court recommended to the parties to compromise the action, upon payment of the commission according to the smallest amount of freight contemplated; and on this day, they having agreed to it, a rule was made to reduce the damages accordingly, and the rule for a nonsuit was

Discharged.

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JACOB *v.* JANSEN.

The statute 42 *G.* 3. *c.* 77. has repealed the necessity of a licence from the *South Sea* Company or *East India* Company for ships passing through the Streights of *Magellan* or round *Cape Horn*, and trading in the *Pacific Ocean*, from *Cape Horn* to 180 degrees *West* longitude from *London*.

Whether they combine fishing with their trading or not.

THIS was an action upon a policy of insurance, dated the 11th *June* 1807, at and from *London* to the *South Seas*, and back to *London*, with liberty to touch, discharge, and take in goods at all ports and places in the course of the voyage, whether in the *English* channel, at *Madeira*, *Cape De Verd Islands*, *St. Helena*, the River *Plate*, or elsewhere, also with like liberty at any port or ports in *South America*, as well on this side as on the other side of *Cape Horn*, and during her voyage and trading, with leave to barter, sell, and exchange property notwithstanding the colonial laws of *Spain*, upon the ship *Memphis*, with liberty to chase, capture, man, and convey any vessel or vessels, and to seek, join, and exchange convoys:' the value was thereafter to be declared by the assureds: upon the trial of this cause, at the *London* sittings after *Michaelmas* term 1810, it was proved that the ship *Memphis* was a trading vessel, and not a fishing vessel, that she sailed on the voyage insured, in company with the *Hero*, on a trading adventure, and on the 12th *July* left *Madeira*, and continued in her company until the 24th, when they parted, and the *Memphis* had not since been heard of. It was objected for the Defendant, that the master of the vessel had not procured a licence from the *South Sea* Company, and that for want thereof the voyage was illegal. The jury, however, found a verdict for the Plaintiff for a total loss, subject to this objection.

Lens Serjt., in *Hilary* term 1811, accordingly obtained a rule *nisi* to set aside this verdict and enter a nonsuit; against which

Shepherd and *Best* Serjts., on a former day in this term, shewed cause. They contended that a licence

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from the *South Sea* Company was unnecessary in this case, by virtue of the statute 42 *G.* 3. *c.* 77., which is entitled "an act to permit *British* built ships to "carry on the fisheries in the *Pacific Ocean*, with-"out licence from the *East India* Company or the "*South Sea* Company;" the preamble of which recites, "that it may tend to increase the navigation and fish-"eries of his majesty's subjects, if the restrictions then "subsisting with regard to ships navigating in the "*Pacific Ocean*, between *Cape Horn* and 180 degrees of "*West* longitude from *London*, should be removed," and enacts, "that thenceforth it should be lawful for any "*British* built ship, owned and navigated according to "law, to pass through the Streights of *Magellan*, or "round *Cape Horn*, and to carry on the fisheries in the "*Pacific Ocean*, from *Cape Horn* to 180 degrees of "*West* longitude from *London*, and to trade within the "said limits, without having obtained any previous "licence, permission, or authority for that purpose, "from the court of directors of the *East India* Com-"pany, or from the governor and company of merchants "trading to the *South Seas*." It is important to attend to two former acts which related to fishing alone, and to mark the distinction between them. By the statute of 35 *G.* 3. *c.* 92., entitled "an act for further encou-"raging and regulating the *Southern* whale fisheries," *s.* 26., all ships intending to navigate within, or frequent any part of the seas comprized in the boundaries of the exclusive trade of the *South Sea* Company, as described in the stat. 9 *Ann* *c.* 21., are required, "before they "shall proceed on any such voyage, to take a licence "for such voyage from the *South Sea* Company." And by 38 *G.* 3. *c.* 57., which is entitled "an act for further "encouraging the *Southern* whale fisheries," the pre-amble of which, as well as of the last-mentioned act, recites that it was "proper to encourage the fishery

"carried

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"carried on by his majesty's *European* subjects in the "seas to the *Southward* of the *Greenland* seas and *Davis's* "*Streights*, for the purpose of taking whales, and other "creatures being in those seas," and refers to the 35 *G*. 3. *c*. 92., it is enacted in the third section, that for extending the limits prescribed in the last recited act for the *Southern* whale fisheries, any ship fitting and clearing out, and licensed, conformably to the act of 35 *G*. 3., and sailing to the *Eastward* of the *Cape of Good Hope*, might pass beyond 51 degrees of *East* longitude from *London*, provided that such ship, after passing 51 degrees of *East* longitude from *London*, should not sail or pass to the *Northward* of 15 degrees *Southern* latitude, till she shall have sailed to the *Eastward* of 180 degrees of *East* longitude. And by the next section, any vessel fitting, and clearing out, and licensed, conformably to the said act, and sailing to the *Westward* of *Cape Horn*, or through the Streights of *Magellan*, for the purpose aforesaid (of fishing), may pass beyond 180 degrees of *West* longitude from *London*, provided such ships, when they have passed beyond 180 degrees of *West* longitude from *London*, do not pass to the *Northward* of 15 degrees *South* latitude, until they come within 51 degrees of *East* longitude from *London*. They admitted that the two earlier acts, which had for their object merely the encouragement of the fisheries, did not dispense with the necessity of a licence; but the 42 *G*. 3. had a much larger scope. It was intended to give free licence to trade with the *Spanish* colonies, which was contraband by the laws of *Spain*, in such a manner, as not to give alarm to that jealous government; and with that view the preamble was made much more comprehensive than the title of the act, and the purview much more comprehensive than the preamble. [*Mansfield* C. J. Would not the inhabitants of *Spain* be as likely to read the body as the title and preamble of the

7 act?]

act ?] The true construction of the act is, that it shall be lawful for all *British* ships navigated according to law, which refers only to the navigation laws, and not the rights of monopoly, to fish within those limits, and also that it shall be lawful for all *British* ships navigated according to law, to trade within the same limits: it is no more necessary that trading ships should fish, in order to entitle themselves to the benefit of the statute, than it is that fishing ships should trade, in order to bring themselves within the same indulgence. It may be admitted that the two statutes for the extension of the fisheries, so far as they invade the monopoly of the *Eastern* hemisphere, have extended the indulgence to fishing vessels only, but that is not so with regard to this statute, and there is this substantial reason for the difference, that the *East India* Company are of themselves competent and sufficient to carry on the trade, whereas the *South Sea* Company have no trade, and therefore cannot be losers by the extension of the trade to others; therefore it was the object of government to lay open to the subjects at large, as well the trade as the fisheries of the *Pacific Ocean*. It is so beneficial to this country to extend the limits of trade, that the Court will, if possible, adopt the construction which favours it. Neither any grammatical, nor any reasonable construction, confines that trading to fishing ships.

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Lens Serjt., *contrà*, urged, that although in certain cases the enacting part of a statute may extend its operation much more widely than the preamble, yet that must be in cases where the intention is clear. If the Plaintiff's construction be correct, the statute 47 *G.* 3. *sess.* 1. *c.* 23. was wholly unnecessary. The principal object of this act 42 *G.* 3. was the fishery, and if it

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embraced trade, it was only subservient to the fishery, or as giving liberty to trade if the ships were disappointed of fish: but it must be construed as restraining that liberty to fishing vessels. Until the passing of this statute the monopoly of the trade of both hemispheres was clearly protected from interlopers, unless they were licensed: it is not pretended that the trading monopoly of the *India* Company is done away; and it is not to be intended that the legislature meant to deprive the *South Sea* Company of their exclusive monopoly of the *Western* hemisphere in this covert and ambiguous way. It is clear that the persons who penned the statute 47 *G.* 3. *sess.* 1. *c.* 23. understood that the monopoly of both Companies still subsisted, otherwise they would have confined the repeal of the 9 *Ann. c.* 21. to such conquered countries as are on the *East* side of *America* only, instead of repeating the permission, as extended to all places which should be in his majesty's possession, as well on the *East* as the *West* coast of *America*. In the very next year, 43 *G.* 3., another statute, *c.* 90. passed, declaring in *s.* 2. that vessels clearing out, and licensed, conformably to the 38 *G.* 3., and passing to the *West* of *Cape Horn*, or through the Streights of *Magellan*, for the purpose of carrying on the fishery, and having passed beyond 180 degrees of *West* longitude from *London*, may pass to the *Northward* as far as 10 degrees *Southern* latitude, but not further, until she shall have sailed within 51 degrees of *East* longitude from *London*. [*Lawrence* J. It may from that act be inferred that in certain other limits the necessity of a licence is abolished.]

MANSFIELD C. J. According to the construction now contended for on the part of the Plaintiff, this act 42 *G.* 3. is a total destruction of the monopoly of the

South

South Sea Company on the *Weftern* coaft of *America*. If that be fo, it is very fingular that it was never before difcovered.

CHAMBRE J. Every one of thefe acts is to a certain degree a violation of the rights of the *South Sea* Company. Even the limited conftruction, reftricting the indulgence to the right of fifhing, is a violation. The preamble is very ftrong in favour of the larger conftruction. Navigation is mentioned as the firft object, and the intention feems to be to remove the obftructions to veffels navigating the *Pacific Ocean*.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

Confidering, as we do, that the act of parliament was made for the benefit of trade, as well as of the fifheries, and confidering the queftions that may arife on the point, what degree of fifhing is neceffary to authorize a fhip to trade, if we fhould hold it neceffary that a fhip fhould both fifh and trade, we think it better to decide, that a fhip may go either for the fole purpofe of trade, or for the fole purpofe of fifhing: therefore the

Rule muft be difcharged.

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GARRICK *v.* WILLIAMS and Others.

If a correct memorial of an annuity-deed be incorrectly inrolled for a time, and after some years the officer of the inrolment office discover and rectify the error before any proceedings had to vacate the annuity, the Court finding the inrolment right when they call for it, will not enquire when the entry was made.

But it is a high misprision in an officer to alter the inrolment without the sanction of the Court of Chancery.

Whether it be sufficient for the grantee of an annuity to carry a memorial to the inrolment office, and pay for it, without insisting on himself seeing it inrolled, and comparing the inrolment with the original memorial, *quære*.

LENS Serjt. had on a former day in this term obtained a rule *nisi* to cancel the warrant of attorney which had been given in this case to secure an annuity, and to set aside the judgment entered up, and execution levied thereon, and restore the money, upon the affidavit of a surety, which stated, that in 1806 the deponent became surety for the payment of an annuity of 100*l.*, then granted by the Defendants *Williams* and *Barnes* for their respective lives to the Plaintiff, and with that intent signed certain deeds. That the deponent in *November* 1810 applied to the inrolment office for a copy of the record of the memorial, and thereupon received from the clerk at the inrolment office a copy thereof, which did not contain the names of the witnesses to the bond, nor any authority to any attorney to enter up any judgment against the deponent, nor any term, nor any date to such supposed authority; and the deponent thereupon examined the copy with the memorial inrolled, with which, he found, it corresponded with respect to such defects. The attorney for the Defendants swore that the copy of the memorial which he annexed to his affidavit was a true copy of the record, as it was in *November* 1810 entered on the rolls of the office, and that the inrolment then corresponded with respect to such defects. That having reason to believe that the memorial inrolled had been altered subsequently to the time of his former examination, the deponent had lately again inspected it, and discovered, that an addition had been made to the record, and that the names of the witnesses to the bond, and an authority to certain attornies to appear for the Defendants, and confess judgment, and the date thereof, had been inserted in the

margin

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margin of the roll, subsequently to *November* 1810, and more than four years after the execution of the deeds and other instruments signed and given for securing the annuity.

Best Serjt. shewed cause against this rule, upon an affidavit of one of the entering clerks in the inrolment office, that in consequence of the error in the memorial being pointed out to him by the Defendant's attorney, he rectified it, and offered to rectify the Defendant's copy of it accordingly, which was refused; and that it was the common practice of their office, if they discovered any error in the inrolments of memorials, to rectify them by insertions in the margin of the roll. That when an original memorial is brought into the office, the hour and day are immediately marked on it, and that from that time forward the inrolment is considered as complete. The attorney for the annuitants swore, that the original memorial, which he deposited in the office, had not these defects. *Best* contended, that if a correct memorial were left at the office within the 20 days, the annuitant had completed his title; the officer might inrol it at any subsequent time that suited his convenience; and when inrolled, the inrolment would have relation back to the time of leaving the memorial in the office. If the bargainee of an estate were to be answerable for the due inrolment of a bargain and sale by the officer, after he had left his instructions at the office, it would shake half the titles in the kingdom. The statute 17 *G.* 3. *c.* 26. *s.* 5. directs, that the memorials shall be inrolled in order of time as the same shall be brought to the office. If an annuitant carries his memorial on the 20th day, and finds only one clerk in the office, who has five hundred previous memorials then to be inrolled, it would be very hard that the grantee should therefore lose his annuity. No person

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can be injured by the miſtake; for either party who wiſhed to act upon it, muſt obtain an office copy, and in comparing that copy with the original memorial, as the practice is, the miſtake would be diſcovered and rectified, as was the caſe here. This annuity had ſubſiſted four years, had been aſſigned for a valuable conſideration, and one of the atteſting witneſſes, who might have proved all circumſtances relating to the conſideration, was ſince dead. The certificate indorſed on the deed records the inrolment as made on the 7th day of *Auguſt* 1806, at ſeven in the evening, purſuant to act of parliament, and is ſigned by the proper officer.

Lens in ſupport of his rule. The officer who ſigns this certificate, is miſtaken in taking it for granted, that the leaving the memorial at the office is the act of inrolment. The fact of aſſignment makes the caſe ſtronger againſt the annuitant; for if he had uſed ordinary diligence, he would have diſcovered the miſtake at the time of his examining the title. The queſtion does not here ariſe, whether the officer could perfect the memorial a day or two after the 20 days are elapſed; for the Plaintiff's argument goes to the extent, that if the memorial be left in the office, though it be never inrolled at all, the annuity ſhall be good. But the words of the ſtatute are imperative, that it ſhall be inrolled within the 20 days; and if it is not done within that time, the ſecurities are avoided. The objection is not, that the copy is incorrect, but that the original, the roll to which the public have reſort for inſpection, and by which they are to be guided, in order to know whether all things are duly done, is incorrect. The object of the act is, that the public ſhall have acceſs to the contents of the inrolment: the ſum paid, too, for inrolment, and for a copy, and which is regulated by the number of words, will vary if the memorial be incorrectly inrolled. 5 *Co.* 84. *Berriman's*

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Berriman's case. The custom of the manor was that alienations should be presented at the manor court within a year. The Court said, *caveat emptor*, he is at his peril to perfect all that is necessary for his assurance. It was incumbent on the grantee to see this done, and the neglect of the officer is the misfortune of the grantee, who may have an action against the officer for his negligence, but the securities are, in the words of the act, wholly null and void. The quantity of business with which the office is filled, is no reason why it should not be inrolled in due time, for the statute gives a profit to the officer for making the inrolments, and the amount of the fees is according to the length and number of the memorials: having therefore a profit for his duty, he is bound to discharge his duty, and is bound at his peril to provide a sufficient number of clerks and servants to inrol the memorials within 20 days as fast as they come in. The objection is not here that the memorial was not inrolled within the 20 days, but was inrolled within a reasonable time after; but the objection is, that it was falsely memorialized within the 20 days, and that the fallacy has subsisted for four years. The statute could not intend that it was sufficient for the grantee to leave his instructions at the office.

The Court strongly reprobated the conduct of the officer, in thus signing a certificate, which was clearly false, and said that he was guilty of gross negligence, and that he ought not to have made the alteration without the consent of the Court of Chancery.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court.

This was a motion to set aside a warrant of attorney and judgment given for securing an annuity, on the

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ground that it is void under the ſtatute, for want of a memorial being inrolled in due time; and the repreſentation is, that a perfect memorial was prepared and carried to the office within 20 days, but that the roll itſelf, when firſt looked at, did not contain certain material parts of the memorial, but that now, when the motion is made, the roll does contain a correct copy. This is the firſt time this queſtion has been agitated, and it is attended with conſiderable difficulty. The framers of this act did not at all know what they were requiring, in having theſe memorials inrolled; probably they thought a memorial would be a very ſhort thing, and that many might be inrolled in a very ſhort time; but the various very minute and nice queſtions which have ariſen on the act, have introduced a practice, (and I ſee not how it can be avoided,) of copying almoſt the whole of all the inſtruments on the roll. Now it might be impoſſible for the officers, every day, or even every month, to put theſe on the roll. The act requires that a memorial ſhall within 20 days be inrolled, and ſection 5. directs, that there ſhall be a particular roll provided and kept, on which ſuch memorials ſhall be entered, and proceeds to enact, "that every ſuch memorial ſhall be duly inrolled, in order of time, as the ſame ſhall be brought to the office, and that the clerks of the inrolments, or their deputy, ſhall ſpecify on the roll the certain day, hour, and time on which the memorial is brought to the office, and ſhall grant a certificate of the inrolment thereof when required." If this act of parliament, as it ſtands, were peremptory that the inrolment ſhould be made and completed within the 20 days, and never be altered, it requires an impoſſibility, for it never can be done; it muſt be enough, therefore, if the deed is brought in due time, and left for inrolment when the officer can do it. The queſtion is, whether the Court, finding the record to be now right, will ſay that

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that the inrolment was insufficient, and overturn the annuity, the record being correct; and we think that the Court, finding the record now correct, ought to be satisfied, and inquire no further. There have been questions in the old law on the statute of inrolments, which sustain us in the doctrine that we should look to the roll only and no further; in *Hinde's case*, 4 *Rep.* 71. one question was, amongst others, whether any averment could be received with respect to the time of the inrolment, and whether that could be pleaded as a matter *in pais*, or must be decided merely on the record: the party by his demurrer confessed the inrolment was made after the fine, and so the fine operated, and the bargain and sale did not operate; and there being no attornment, no action of waste could be maintained in respect of that estate; and whether the estate could pass by the bargain and sale, not being inrolled within the time, was the question; and it was held it could not. *Gilb. on Uses*, says, "As to averring an inrolment, this must be understood when the time of inrolling was not entered on the record; but since 16 *Eliz.* the date of the inrolment has been entered. *Mod.* 504. 1 *Leon.* 582. are cited, and are nothing to the purpose; but in Sir *T. Howard's case*, *Owen*, 132. the same point appears to be ruled; and so we think that the memorial on which these annuities are inrolled shall be conclusive, and that no averment or evidence shall be received to shew that the date is incorrect; and according to these cases we must say, that the memorial was inrolled within 20 days, and therefore the

Rule must be discharged.

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FAYLE and Another v. BOURDILLON.

May 27.

Under a licence to *British* brokers resident here, that a ship bearing any flag may import from an enemy's country, to whomsoever the property may appear to belong, three *British* subjects, not named in the licence, one of whom resides in a hostile country, may import from another hostile country to this.

And the agent who effected the policy, may recover in trust for three *British* partners, one of whom, at the time of the action, resides in an alien enemy's country.

THIS was an action upon a policy, effected by the Plaintiffs, as agents, as well in their own names as for and in the name and names of all and every other person and persons to whom the same did or might appertain, in part or in all, at and from *St. Petersburgh* to *London*, with or without simulated papers or licences, upon the ship *Sophia Carolina Albertina*, at the rate of twenty guineas *per cent.* The insurance was declared to be "on goods, as interest might appear, to be thereafter declared and valued." The Plaintiffs averred the loading of a cargo of the value of 4130*l.* at *St. Petersburgh*, and that *Macnab*, *Stewart*, and *Barclay* were interested in the goods to the amount insured, and that the insurance was made for their use and benefit, and that by a memorandum afterwards indorsed on the policy, the interest was declared to be in them, and the goods were valued at 4130*l.*, including premium of insurance, commission, and all charges incident to a loss. The Plaintiffs then averred in their first count, a loss by perils of the sea, and in the second, a loss by hostile force. Upon the trial of this cause, at *Guildhall*, at the sittings after *Trinity* term 1811, before *Mansfield* C. J., it was proved that *Stewart* resided at *Hamburgh*, *Barclay* at *Glasgow*, and *Macnab* at *Gottenburgh*, and that they were partners in trade. It was proved that upon the petition of the Plaintiffs, a licence had been granted by the privy council, "to *Benjamin Fayle* and Company, merchants," thereby "permitting a vessel, bearing any flag, to proceed with a cargo of such goods as by law are permitted to be imported, from any port in *Russia*, *Prussia*, or *Denmark*, to any port in this kingdom: the master to be permitted to receive his freight and depart with his vessel to any port not

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not blockaded, notwithſtanding all the documents that might accompany the ſhip and cargo might repreſent her to be deſtined to any other neutral or hoſtile port, and to whomſoever ſuch property might appear to belong," under the uſual proviſions for indorſing, &c.; the licence was dated on the 11th of *May* 1809. *Stewart* wrote a letter from *Hamburgh* on the 8th of *July*, apprizing the Plaintiffs that he had chartered the ſhip *Sophia Carolina Albertina* to go from *Roſtock* in ballaſt to *Peterſburgh*, for a cargo of flax and hemp, which would be addreſſed to the Plaintiffs, and giving them inſtructions "to effect an inſurance thereon from *St. Peterſburgh* to *London*, either on receipt of the letter, or on the ſhip's arrival in *London*, at their diſcretion, adding that perhaps they could get 3000*l.* proviſionally covered better now than later in the ſeaſon;" in conquence of which letter the Plaintiffs effected the inſuſurance in queſtion on the 24th of *July*. The veſſel took in her cargo at *St. Peterſburgh*, and was loſt on the homeward voyage. The bills of lading were conſigned to the Plaintiffs, but they were not intereſted in the goods. *Stewart*, *Macnab*, and *Barclay* were all *Britiſh* ſubjects. The action was commenced in *January* 1811. No evidence was given of the relations of amity or otherwiſe at that time, or at the time of plea pleaded, or trial had, exiſting between *Hamburgh*, *Sweden*, and *Great Britain*; but the counſel for the Defendant aſſumed it as a fact of which the Court had judicial notice, that *Hamburgh* and *Sweden* were both in a ſtate of hoſtility with *Great Britain*, and that therefore *Stewart* and *Macnab*, although *Britiſh* ſubjects born, were alien enemies, and they raiſed upon this ground two objections to the Plaintiffs' right to recover: firſt, that no action could be maintained to recover money for the benefit of alien enemies; ſecondly, that the licence which had been granted, did not legalize the

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trading by alien enemies, upon which this insurance was effected, but was confined to *Fayle* and Co. *Mansfield* C.J. reserved both these points, subject to which the jury found a verdict for the Plaintiffs.

Best Serjt. having, on a former day in this term, obtained a rule *nisi* to set aside the verdict, and enter a nonsuit,

Shepherd and *Vaughan* Serjts. shewed cause. As to the effect of this licence to legalize the trade, when the policy was effected, there was no war subsisting between *Great Britain* and *Sweden*, and the partner resident at *Hamburgh* undoubtedly is not an alien enemy; but even if the partners had all been resident at *Petersburgh*, between which country and *Great Britain* there is undoubted war, this licence, the purpose of which is, to do away the disabilities incident to a state of warfare, would have legalized the traffic. The object of these licences is to facilitate the importation of particular species of goods into this country, no matter to whom they belong; whether to an enemy resident in the exporting state or to others. The owner and the goods are equally adopted as *British* by this licence. There are sound reasons for not introducing into the licence the names of the traders, for the licence must be on board the ship, and might fall into the hands of the enemy, at all events copies may be legally obtained here by the enemy's agents, and to insert the names would subject to confiscation and the heaviest punishments, the goods, and the importers or exporters, if discovered and taken in any country over which *France* exercises her domineering influence. All trade with any foreign state is reduced to this, that either the *British* merchant must send out his ship with bullion to purchase commodities, or that foreigners, as consignors or con-

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signees at the foreign ports, either on their own account or as agents, must participate in the trade. Many licences require a cargo to be first exported, and legalize the importation of a return cargo only, many require the goods imported to be the property of the person licensed, as in *Feise* v. *Thompson*, *ante*, 1. 121., or the property of the bearer of their bills of lading, as in *Deffis* v. *Parry*, 3 *Bos.* & *Pull.* 3. The words of this licence are most general, and most cautiously worded to avoid being restricted to any individual or class of men whatsoever, so long as the possessor of it properly and legally comes by the possession. It is not a licence, that the Plaintiffs may import, but it is granted to the Plaintiffs that a ship may come from an hostile port, bearing any flag, and freighted with any man's property. This licence is therefore transferable to any person, whatever be his political relation, to whom the Plaintiffs, in the exercise of that discretion which the government has reposed in them, shall think fit to communicate that benefit. In *Kensington* v. *Inglis*, 8 *East*, 273., it was held that the Plaintiff might recover on a declaration averring interest in *Juan Villas*, an alien enemy, the adventure being legalized by a *British* licence, because that traffic could not be carried on but in *Spanish* vessels. They referred largely to the judgment in *Usparicha* v. *Noble*, 13 *East*, 332. As the trade would be authorized therefore by this licence, if the goods were wholly the property of an alien enemy, so it can be no objection that an alien enemy has a part interest in them. A *British* subject too, though resident in an enemy's country, may still be a subject, for all the purposes of being a partner in a house of trade here, and of trading, as from that house; as he may, on the other hand, be an alien enemy, so far as he mixes himself with the commercial transactions of a house of trade in an enemy's country. Case of *Jonge Glassina*, 5 *Rob.* 299., Sir *W. Scott* held that a licence

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to Mr. *Ravie*, of *Birmingham*, to import hither from *Holland*, did not legalize an adventure by Mr. *Ravie* of *Amsterdam*, as a *Dutch* exporter. Therefore, in this case, the two national characters which *Macnab* possessed of *Swede* and *Englishman*, may be severed; and it was perfectly lawful for *Stewart*, *Macnab*, and *Barclay* of *Glasgow*, to import these goods from *St. Petersburgh* into *England*, to insure them, and to enforce the policy by an action in the name of their broker for their benefit, although the same things would not have been lawful to *Stewart*, *Macnab*, and *Barclay*, of *Gottenburgh*. But at all events a contract made with an alien not in a state of war is legal, and may be recovered on, so that the Plaintiff is entitled to recover at least for the interest in two thirds of the cargo, the shares of *Stewart* and *Barclay*.

Best contrà. The rule must be made absolute on both grounds. First, that the licence does not protect this property. Secondly, that two of the three persons, in trust for whom the Plaintiff sues, are alien enemies. As to the first ground, it is essential that the king should know how, and by whom, the trade is carried on: this is a licence to *Fayle* and Co. to import, and to no one else; the words, to whomsoever the property may appear to belong, are only an extension of the liberty to use simulated papers; they mean the ostensible appearance, not to whomsoever it shall ultimately be proved, to the satisfaction of a court of justice, that the property belongs. If the Plaintiffs' construction should prevail, it must go so far, that this would be a licence to go to any port whatsoever in the whole world. If the present form of the licence, according to the sound construction, frustrates the intention of the government or of those who obtain it, that may be a very good reason why the privy council should adopt another form for

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these instruments, but none for departing from the sound construction. No case can be cited, where a licence granted to one man can be used by another. Licence is not in its nature assignable, even if granted by a subject. In the case of *Feise* v. *Thompson*, the licence was differently worded. But in the case of the *Jonge Johannes*, 4 *Rob.* 263. where the licence permitted *Bridge* and *Smith*, or their agents, or the bearers of their bills of lading, to import on board three neutral vessels, a claim was made by *Smith* on behalf of various proprietors, on the ground that he had obtained the licence in consequence of instructions from his correspondents. Sir *W. Scott* held, that a material object of the controul which the government exercises over such a trade, was, that it might judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war. The purpose of these licences is the employment of *British* labour and *British* capital, not the employment of foreign seamen and the capital of persons resident in *Germany*. In the case of the *Cristina Sophia*, cited 4 *Rob.* 12. and 267., the broker, who procured a licence to himself and company, made oath that he intended to include, under the denomination of company, all the owners of the several parts of the cargo, and " the Court acceded to the favourable suggestion, that the *Irish* government might be apprized of the intention of including all the persons, that the broker might have stated their names, and have taken the licence in that abbreviated form." But there is nothing similar in this case. The risk of the underwriter is increased by the assured not conforming to these regulations, for the vessel which has on board a cargo not so licensed, is liable to seizure by *British* cruizers and confiscation. *Heller* v. *MacConnel*, 3 *Bos. & Pull.* 113., it was held that a commission of bankrupt could not be supported, which was sued out

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on the oath of the partners, two of whom were *British* subjects domiciled in *France*; for the petitioning creditors must have a debt for which they could sue here. The case of the *Jonge Glassina* is favourable to the Defendant, for if *Macnab* of *Gottenburgh* had applied for the licence which was granted to the Plaintiff, it would have been refused him. The doctrine that if a licence be extended to an alien enemy, it enables him to bring all those actions which spring out of the transaction, cannot be denied, but it renders it the more necessary, not to extend to alien enemies the benefit of such licences, without express words or necessary implication. In *Kensington* v. *Inglis* the licence was to *Read*, to import in any *Spanish* vessel: it followed by necessary implication, that there would be *Spanish* property embarked in that adventure, and the *Spanish* subjects to whom it might belong, were therefore virtually licensed. The same observation applies to *Usparicha* v. *Noble*. If the Plaintiff cannot recover the whole, he cannot recover a part, for the Court has no means of ascertaining what share belonged to one and what to another partner, nor of apportioning the verdict. No grant of the king can take effect, unless it be made upon a full knowledge and disclosure of all circumstances. It is impossible the king should know for whose benefit the transaction is carried on, when the licence is thus worded and thus transferred. [*Mansfield* C. J. The same objection would have militated against the judgment on the *Christina Sophia*.]

Cur. adv. vult.

Mansfield C. J. now delivered judgment. The case of *Deffis* v. *Parry* so far resembled this case, that *Bridge* and *Smith* had no interest in the cargo, but they were the consignees of it, as *Fayle* and Co., in this case, are the consignees of the goods. But on the whole,

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considering the terms of this licence, it seems to us that it does not found any objection which the underwriters can take, to prevent the Plaintiffs' recovering on this policy. The words of the licence are as general as it is possible for them to be; they are without reference to the goods being the property of any particular persons. The words of the licence are, "we hereby grant this licence to *B. Fayle* and Co., merchants, for the purposes specified in the order of council, and do hereby permit *a* vessel, (not any particular person's vessel,) to sail, &c." Under this licence goods are imported from *Russia*, consigned to *Fayle* and Co.; they are the consignees, and are the very persons who applied for this licence and obtained it. The transaction exactly corresponds with this licence, and probably this was the very sort of trade the licence was meant to legalize. Trade with *Russia*, *Prussia*, and *Denmark*, must be carried on either by *British* agents resident there, or by the inhabitants of those countries: but whichsoever of the two put the goods on board the ship, it seems to have been the very intention of government to encourage the importation of these goods from *Russia*, *Prussia*, and *Denmark*; and probably they form the very bulk of this trade from those countries to this, therefore there may be very good reasons for making this licence so general. The question of alien enemy has nothing to do with the case; the question is, whether *Fayle* and Co. have a right now to recover the sum assured? not what they are to do with it when they have got it. The case of *Bridge* v. *Smith*, in *Robinson*, does not apply, for there the person importing was neither the agent of *Bridge* and *Smith*, nor held his bill of lading; therefore the

(*a*) Rule must be discharged.

(*a*) See the following case.

ADVERTISEMENT.

The importance of the subject discussed in the last case will warrant the Reporter in placing here another case which involved the same principles, though not immediately consequent in order of time.

Nov. 27, 1812.

MORGAN v. OSWALD.

A licence to *H. S.*, a *British* merchant, that a ship may go to an hostile port and bring home a cargo of goods, authorizes the importation of such goods, being the property of an alien enemy, subject of that hostile country, and therefore authorizes him to insure, and enforce his contract of insurance in our courts.

If the defence upon a policy be, that the licence requires the date of the ship's clearance from an hostile port to be indorsed thereon, and that it is not truly indorsed; it is incumbent on the Defendant to prove what a clearance is, and the discrepancy between the real date of the clearance and the date indorsed.

If the date be indorsed as the 17th, and the real date of the clearance be the 20th. *Semble* that it is a substantial compliance with the condition.

Quære whether a clearance be any single document, or the collection of all the papers necessary to enable a ship legally to sail?

Licences to trade ought to be construed liberally.

THIS was an action brought on a policy of insurance on goods shipped in the ship *America*, on a voyage from *Archangel* to *London*. Upon the trial at *Guildhall*, at the sittings after *Hilary* term 1812, before *Mansfield* C. J., three points were made for the defendants. 1. That there was a deviation by the ship's going back to *Archangel* under stress of weather, in order to refit, it being contended that there were other ports nearer to the place where she received damage: but upon this point the jury, at the trial, and the Court on reviewing the evidence, upon the motion for a new trial, made by *Best* Serjt. in *Easter* term 1812, were of opinion that *Archangel* was the most proper place to which she could have gone for repairs, and that there was no deviation. The second and third points upon which the Defendants rested their case arose on the licence. The material parts of which were, that the undersigned *R. Ryder*, in pursuance of an order of council, specially authorizing the grant of that licence, did thereby grant that licence, for the purpose set forth in the said order of council, to *Henry Siffkin*, and did thereby permit a ves-

ſel, bearing any flag except the *French*, to proceed in ballaſt from any port north of the *Scheldt* to *Archangel*, or any other port in the *White Sea*, there to load a cargo of ſuch goods as were permitted by law to be imported, (except *German* linens, ſtock-fiſh, and oil,) and to proceed with the ſame to a port of the United Kingdom: the maſter to be permitted to receive his freight, and depart with his crew and veſſel to any port not blockaded, notwithſtanding all the documents which ſhould accompany the ſhip and cargo might repreſent the ſame to be deſtined to any neutral or hoſtile port, and to whomſoever ſuch property might appear to belong; provided that the name of the veſſel, her tonnage, and the time of her clearance from her port of lading, ſhould be indorſed on that licence. The order of council, of the ſame date with the licence, upon the authority whereof it iſſued, purported to be made "upon reading the petition of *Henry Siffkin*," and was expreſſed in the ſame terms as the licence. The following indorſement appeared upon the licence. "The veſſel, for which the within licence has been granted, is the *Roſtock* ſhip, called *America*, *A. Gunter* maſter, of 400 tons burthen, which cleared the port of *Archangel* for the port of *London* on the 5th *September*, old ſtyle, 1810. The cargo conſiſts in 187 caſks of tallow," &c. The captain of the veſſel, being croſs-examined, admitted that he got his clearance at *Archangel* on the 20th of *September* new ſtyle; he received his papers on that day: the veſſel ſailed from *Archangel* on the 22d *September* new ſtyle, and was loſt in her return to *Archangel* to refit, while ſhe was coming in over the bar of the harbour. The goods inſured were the property of *Brandt*, *Rodde*, and Company, of *Riga*, *Ruſſian* ſubjects, there being at the time of the inſurance and adventure war between *England* and *Ruſſia*. The firſt objection made upon theſe facts was, that the condition of the licence

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had not been complied with, inafmuch as the true time of the fhip's clearance from her port of loading was not indorfed on the licence; and that therefore the adventure was illegal: the fecond objection was, that the perfons interefted were alien enemies, the importation of whofe property was not authorized by that licence. The jury, however, under the direction of *Mansfield* C. J., found a verdict for the Plaintiff, for a total lofs, with a fmall benefit of falvage: and *Beft* obtained a rule *nifi* for a new trial upon the two points laft mentioned, and alfo upon the queftion whether the jury ought not to have found an average lofs only: but this laft point was not mentioned upon the difcuffion of the rule.

Shepherd and *Lens* Serjts. in *Michaelmas* term 1812, fhewed caufe againft this rule. They contended that the condition of the licence was fufficiently complied with. The procefs of obtaining a clearance was a work of feveral days; the clearance confifted not in any one particular paper, but in the whole number of papers requifite to enable the fhip legally to profecute her voyage; a feaman applied at the cuftom-houfe for his papers on one day, and received them on another. Probably the indorfement on this licence was made there on the day on which the captain firft applied for them. [The Court fuggefted, that as this adventure was contraband in *Ruffia*, it could not be prefumed that the indorfement was made by the officers of the cuftoms at *Archangel*. It certainly was the practice in *England* for the captains of veffels to procure fimilar indorfements to be made at the cuftom-houfe, although no law required them to be there made.] It was often the practice of the merchant who was the owner of the veffel or cargo, and refident perhaps at a confiderable diftance from the place where the fhip lay, to procure the clearance; in fuch a cafe, a literal

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a literal compliance with the condition of the licence would be impossible; in the present case it was substantially complied with, which was all that was necessary. *Edwards's Leading Decisions in Cases of British Licences*, 24. *Vrow Cornelia*. *Scott* J. says: "In the use and application of licences, the Court will not confine the parties to a literal construction. It is sufficient that they shew, under the difficulties of commerce, that they come as near as they can to the terms of the licence; and where that is done, the Court will not prevent them from having the entire benefit intended by his majesty's government." In the cases of *Robinson* v. *Cheeseswright*, and *Same* v. *Touray*, now pending in the King's Bench on the same ship and policy, that Court appeared disposed to consider the clearance as a continued act, the collection of all the papers that are necessary to enable a ship to sail, so that the time of applying for or obtaining any one of those papers may properly enough be called the time of the ship's clearing. On the second point, they contended, that the language of this licence was the most comprehensive that could be used. It did not require that the ship or cargo should be the property of *Siffkin*, to whom the licence was granted, as in *Feise* v. *Thompson*, *ante*, 1. 121., and *Feise* v. *Waters*, *ante*, 2. 248., or the bearers of his bills of lading, as in *Deffis* v. *Parry*, 3 *Bos.* & *Pull.* 3.; nor did they require, as many licences expressed it, that it should be the property of *Siffkin* or other *British* merchant, as in some other cases, nor that it should be the property of *Siffkin* or others, as in the cases of *Flindt* v. *Scott*, 15 *East*, 524., and *Flindt* v. *Larkin* (*a*). Nor was it a licence for *Siffkin* to import: it was a licence to *Siffkin* for a ship to import. It did not define to whom, or to what country the vessel

(*a*) Since reported in *B. R.*, 1 *Maule* & *Selw.* 217. 220.

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ſhould belong; it was expreſsly permitted that the ſhip might bear any flag except the *French*; and the licence was to be effectual, to whomſoever the property in the goods might appear to belong, which meant, to whomſoever they actually might belong. This conſtruction was fortified by conſidering the purpoſe of theſe licences, which was to ſanction and facilitate the importation of the ſpecies of goods of which this country ſtood moſt in need, not further regarding who might be the owners, or who might derive the profit of the adventure, than by placing it under the guardianſhip of the perſon whom the government conſidered worthy to be entruſted with the management of this licence. The courts of admiralty have uniformly put this conſtruction upon the words "to whomſoever ſuch property might appear to belong." In the caſe of the *Couſine Marianne*, *Edwards's Leading Deciſions in Caſes of Britiſh Licences*, 20., *Scott* J. ſays: "this Court has never yet reſtored the property of an enemy, except in thoſe inſtances where the words "to whomſoever the property may appear to belong," are introduced into the licence. Where thoſe words occur, they have been held to exclude all enquiry into the proprietary intereſt." The ſame was held by *Grant* M.R. in the caſe of the ſhip *Hendrick*, 1 *Acton*, 329. In the caſe of the *Vrow Cornelia*, *ibid.* 23., though the facts are not ſimilar, yet the deciſion of *Scott* J. abundantly eſtabliſhes the poſition, that licences are to receive the moſt liberal conſtruction. *Uſparicha* v. *Noble*, 13 *Eaſt*, 332., recognized the principle that a licence authorizing a trade to the port of an alien enemy, intends that alien enemies reſident there muſt have intereſt in the goods conſigned thither, and therefore impliedly authorizes ſuch conſignees to inſure the adventure licenſed, and to enforce the contract of inſurance by ſuit in our courts. Upon the ſame principle, this licence intends that the goods to be exported

from

from *Archangel* will be the goods of alien enemies resident there, and it also impliedly authorizes them to effect here insurances on their property, and to enforce their contract in this country, as a part of the necessary rights and protection incident to the enjoyment of that commerce which it is the purpose of these licences to permit and encourage. If this were a licence, the only object whereof was the furtherance of our own export trade, there might be more reason for restrictions upon the homeward cargo; but the object of this licence is evidently the homeward cargo only, for the ship is to go to *Archangel* in ballast. It does not prescribe whether the homeward cargo shall be *English* or *Russian* property: it may possibly be *English*, but it is more probable it should be *Russian*, and if it be, the country obtains this additional benefit, that the goods, of which she stands in need, are consigned hither at the risk of *Russian* subjects, and by the employment of *Russian* capital in our service. If it restricted the goods of the sorts required to such as were *English* property only, it is most probable that no such cargoes could be procured.

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Best and *Marshall* Serjts., in support of the rule, contended, as to the first point, that the words requiring the date of the clearance to be indorsed, most rigidly and technically constituted a condition; there might be good reason for the government to wish to know the exact moment of a ship's quitting an enemy's country; the reason, however, it was unnecessary to enquire, since, if it were a condition, however immaterial might be the cause for which it was introduced, it must be rigidly complied with. The reason why a warranty in a policy must be literally performed, is because it is a condition. By Lord *Mansfield* C. J., *Dehahn* v. *Hartley*, 1 *T. R.* 345. This condition must, above all others,

 be

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be moſt exactly performed, becauſe it is a condition in a grant of the crown, made in favour of the crown, which is to be conſtrued more ſtrictly than a condition in favor of a ſubject. This Court would heſitate before it would purſue the deciſions of the Court of Admiralty, which avowedly varied a little, according to circumſtances of political expediency; but the Courts of common law could not be guided in their deciſions by motives of political expediency. Had the condition then been performed? If the captain underſtood what a clearance was, according to his teſtimony it had not, for the licence was indorſed as if the clearance had been obtained on the 17th of *September*, new ſtyle, and the clearance was not in fact obtained till the 20th; if the clearance was not indeed any one ſingle document, but the perfecting of all the documents requiſite for the ſhip's ſailing, the time of obtaining the laſt of them was the date of the clearance; and either way, the condition had not been performed. The facts upon which Lord *Ellenborough* directed the jury in the caſes of *Robinſon* v. *Cheeſewright*, and *Robinſon* v. *Touray*, are not before this Court, therefore no application can be made of thoſe caſes to the preſent queſtion. As to the ſecond point, this is the form of licence which would be granted in order to diſpenſe with the diſabilities of trade with *Ruſſia* which a ſtate of war impoſes, and to enable a *Britiſh* ſubject to import foreign property in a *Britiſh* veſſel. But to give it the effect contended for, will be giving the licence a much wider ſcope than the mere diſpenſing with the diſabilities of war; it will be alſo diſpenſing with the proviſions of all the navigation acts, for this is a *Roſtock* veſſel, in which the goods are imported. This indeed his majeſty in council is enabled to do by order in council or licence, under the ſtatute 45 *G.* 3. *c.* 40., whether in a friendly or a hoſtile veſſel; but conſidering the great benefit which this country has derived

derived from the navigation acts, policy requires that any grant made in derogation of those acts shall receive a very strict construction. This licence issues on the petition of *Siffkin*; it is granted to *Siffkin*; it therefore necessarily means that *Siffkin* shall import. If it had been to *Siffkin* and others, that would only have protected others *ejusdem generis*, other *British* subjects, who stood in the same relation to the *British* government, as the Court of King's Bench have determined in the cases of *Flindt* v. *Scott*, 15 *East*, 524., and *Flindt* v. *Crockatt*, *ibid.* 522., and *Flindt* v. *Larkin*, tried 4th *March* 1812 (*a*). This permission is still more confined: it is to *Siffkin* only. It must be intended that the vessel permitted to depart is the vessel of *Siffkin*, and of none other. No words in the licence shew an intention that the privileges conferred by this grant are to be imparted to any other person, much less to alien enemies, or that the goods to be imported should be an enemy's goods. It is a rule in the construction of royal grants, that the king is not bound, unless it appears that all the circumstances are disclosed to him: nor is it to be gathered from the order in council on which the licence was founded, that the king knew the goods were to be the property of alien enemies. It is therefore sought to make of the grant of the crown a use which the crown never contemplated. *Jonge Johannes*, 4 *Rob.* 264., *Scott* J. held that "a material object of the controul which government exercises over such a trade is, that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war." The crown totally fails of this object if the privileges of the licence may be communicated without its knowledge. *Hoffming*, 2 *Rob.* 162., *Scott* J. said, "it is indubitable that the king may, if be

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(*a*) Not yet reported.

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he pleases, give an enemy liberty to import: but I apprehend that unless there are very express words to this effect to be found in the licence, I am to consider its meaning as not going to that extent, but as giving such a liberty only to subjects of this country: it is a licence to *British subjects* to import, and as I understand it, they are to import *on their own account*; and if it appeared that the importation was on the account of other than *British* merchants, I should hold, that under the terms of the licence it could not be considered as a legal importation." [*Gibbs* J., Sir *William Scott* lays down this principle: that while the trade of the country remained in its original state, and the licensed trade was the exception to the general rule, licences were to be construed strictly, but that since the licensed trade has become the general trade, and the unlicensed trade the exception, licences are to be construed liberally.] With the most unfeigned submission to so great a name, that doctrine can never be received in the courts of common law; it will not be endured here that the interpretation now to be put on a written instrument shall be the reverse of the interpretation which was put on the same instrument ten years since, because the instrument is of more frequent recurrence; it would disturb all the rules for the construction of contracts. In the case of the *Jonge Klassina*, 5 *Rob.* 297., where Mr. *Ravie* of *Birmingham*, had obtained a licence for the importation of certain goods from *Holland* to this country, being his property; *Scott* J. held it not to protect goods shipped at the risk of *Ravie* from *Amsterdam*, where he had another house of trade, and the shipping of which goods, *Ravie*, being in *Holland*, personally superintended, *a fortiori* such a privilege is not to be transferred to an alien enemy. The authority of the earlier decisions of that great Judge, backed with the uniform course of the common law, must therefore be opposed to his latter

deci-

decisions; and it is better that the judgments of this Court should militate with the judgments of the Court of Admiralty, than be discordant to the former determinations of themselves and of all the other common law courts. It is not competent for this Court to enter into reasons of state policy, or to conjecture what was the intention of the privy council, or to collect it from the framers of the instrument, or from any other source than the language of the licence. The true meaning of the words "to whomsoever the goods may appear to belong," s not, as has been suggested, to whomsoever they shall belong: for it is a rule of construction that no word is to be rejected as useless when it may bear a meaning, but that construction would make the word "appear" wholly insignificant. A further reason results from the rule "*noscitur a sociis*;" the words are found in the same sentence with the permission to use a fictitious flag, a false destination, and simulated papers, they relate to appearances assumed for the purpose of eluding an enemy, not to the true ownership. It does not appear in the case of *Usparicha* v. *Noble*, what were the terms of the licence. Lord *Ellenborough* C. J., however, said upon occasion of the case of *Mennet* v. *Bonham*, 15 *East*, 477., that if that case were to be pressed upon the Court of King's Bench, they had rather get rid of the authority of *Usparicha* v. *Noble* than of *Conway* v. *Gray*, 10 *East*, 536. That Court sent down the cases of *Hagedorn* v. *Bassett*, and *Hagedorn* v. *Vaughan* (*a*) to a second jury, in order to try whether *Hamburghers* were alien enemies: but the licence, which was similar to this, would have rendered that fact wholly immaterial, if the words "to whomsoever the property may appear to belong," which the Plaintiff's licence contained, would have covered the hostile property. It was ob-

(*a*) Not yet reported.

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ſerved that the ſhip licenſed was to go in ballaſt, but that is not to go from this country, only from ſome port north of the *Scheldt*, that ſhe may not carry on trade between thoſe ports and *Ruſſia;* and this proviſion is perfectly conſiſtent with her firſt carrying out a cargo of *Britiſh* or colonial produce from *England;* therefore that inference fails. It is truer policy to give employment to *Engliſh* than to *Ruſſian* capital in the ſupply of our national wants; and the profits of the trade more than countervail the riſk. This too is a very dangerous power, and may be much abuſed. But the queſtion of policy is not for this Court to conſider.

They prayed that the Court, if inclined to give judgment for the Plaintiff, would permit the caſe to be turned into a ſpecial verdict.

GIBBS J. obſerved that all theſe licences differed ſo much in their terms, that unleſs the very words of the licence granted in each caſe were before the Court, there was no mode of ſeeing how far the caſe cited was applicable to the ſubject of diſcuſſion. The licence in *Uſparicha* v. *Noble* was granted in very early times.

Cur. adv. vult.

On this day *Mansfield* C. J. delivered the opinion of the Court.

This cauſe has been argued much at large. It is an action on a policy of aſſurance, and the principal objection to the policy in this caſe is founded, not on any facts relating to the circumſtances of the voyage, but on the ground that the perſons ſeeking to recover in this action were not perſons authorized by this licence to import the goods which were inſured; there was alſo another previous objection, that ſuppoſing the licence to be effectual, the adventure did not come within the condi-

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tion of the licence. I will take notice of this objection first, because the same thing has been decided in the Court of King's Bench (a). The licence which permits the ships to proceed, has a proviso, that the name of the vessel, her tonnage, and the time of her clearance from her port of loading, shall be indorsed on this licence. An indorsement was made upon the licence, and it is thus indorsed: "The vessel for which this licence is granted is the *Rostock* ship called *America*, *Gunter* master, which cleared the port of *Archangel* for the port of *London* the 5th *September* 1810." That 5th *September* 1810, old style, is the 17th *September*, new style. The captain's evidence was, that he got his papers on the 20th of *September* new style, and sailed on the 22d; and it is objected, that the indorsement does not specify the true date of the clearance. We think, as the Court of King's Bench did, that there is no foundation for this objection, but that the proviso has been sufficiently complied with. In the first place, we do not know what a clearance is; we thought at first, as many other persons did, that it was some particular document or memorandum; but it now appears, that there is no such thing as any one particular paper called a clearance: if there be no such thing, then it is impossible to comply with the literal terms of the proviso. If it had been a single document, and had been prepared at the *English* custom-house on the 17th of *September*, it is very possible that the captain could not, and might not have received it till the 20th; so that even in the case of a vessel sailing from *England*, acts of the officers of government might have prevented a more literal compliance with this condition than has here been practised. But if the Defendant meant to rely on this objection, it was incumbent on him to make out, by some evidence

(a) The Counsel for the Defendant were not aware of the case here alluded to.

or

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or other, what a clearance is, and to shew that the indorsement was not true; this, however, he has not done; and in this obscurity it is impossible for us to say that the truth of the indorsement is inconsistent with the captain obtaining his papers on the 20th. That objection being out of the way, the great objection is, that by the terms of the licence, the goods must be laden by *Siffkin*; and not only that these goods are not loaden by *Siffkin*, but that even if other *British* subjects might import under this licence, yet that the Plaintiffs could not, because they are the enemies of the country. This question is also before the Court of King's Bench, and it would have been desirable if the Judges of both courts could have met and settled the point; but the term drawing to an end, we think it best to decide as well as we can. The petition is the petition of *Siffkin*, and the effect of the licence is to send a ship, to proceed in ballast for any port of *Russia*, and there to load. A ship sent to *Russia* to take in goods, must necessarily be supposed to take in *Russian* goods, and it must be naturally supposed that those *Russian* goods are the property of *Russian* subjects. If *Siffkin* had imported *Russian* goods, no objection could be made; nor, I suppose, if any *British* subject had: but the question is, whether a *Russian* subject may import such. What, then, is the difference whether a *British* or *Russian* subject imports? If a *British* subject imports the goods, in all probability he must pay for them; and they come hither at his risk: if they are imported, as in this case, by a *Russian*, they are at his risk. The great object of the licence is, to have *Russian* goods in this country, and in all the licence there is not a single hint, by whom they are to be put on board. It therefore seems to follow, that they may be put on board by a *Russian* subject; and if it does, then it necessarily follows, that, according to the case of *Usparicha* v. *Noble*, all the rights attach which are necessary

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ſary for the enjoyment of the right of importing; therefore, unleſs we overturn that caſe, which has all the principles of ſound ſenſe to ſupport it, it neceſſarily follows, that a *Ruſſian* ſubject, licenſed to import goods into *Great Britain*, has a right to inſure them. A great number of objections were made againſt this conſtruction of the licence; and much argument was uſed to ſhew by what rule ſuch licences were to be conſtrued; and it was ſaid, they were to be conſtrued ſtrictly. Lord *Ellenborough* and the Court of King's Bench, in the caſe of *Uſparicha* v. *Noble*, and other caſes, and certainly the Court of Admiralty alſo, now are of opinion, that licences ought to be conſtrued liberally, and I think, upon very good ground. This ſpecies of licence has been conſidered as an exception out of the general law, but it is now uſed to carry on a very great part of the trade of the country; and unleſs it were ſo carried on, a very great part of the trade muſt be loſt; and for preſerving it, the licences ought to be conſtrued liberally. And though certainly this Court is not bound to follow the authorities in the Court of Admiralty in general, yet as that Court has primary, and even excluſive juriſdiction in ſeveral ſubjects of capture and marine law, from which the Courts of common law have taken all their doctrine relating to theſe ſubjects, I think it would be of moſt miſchievous conſequence, if hereupon we differed from them. It has been ſaid, that a grant of the king muſt be ſtrictly taken; but this is the firſt time that ſuch a licence as this was ever aſſimilated to a grant of property from the king; a commercial licence is not at all like ſuch a grant. With reſpect to confining the licence to the perſons to whom the licence was granted, I am ſure that that objection has been over-ruled in this Court. In ſome caſes indeed, as *Feiſe* v. *Thompſon*, the licence has been expreſs, to import goods belonging to particular perſons,

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persons, there only the goods which belonged to those persons could be imported; but there are many cases where the licence has been granted for three, four, or five ships, in which no such restriction has prevailed. Much argument has been raised on the words, "to whomsoever they *shall appear* to belong," and it is said that the Court of Admiralty has decided it to mean "to whomsoever they shall belong:" it is unnecessary for us here to consider whether such is the effect of that provision in the licence or not, though I may again observe, that it is extremely desirable that the construction which this Court should put on it, should agree with the construction put on that part of the licence by the Court of Admiralty, because they have the great original jurisdiction in all questions of this sort. I have mentioned the case of *Usparicha* v. *Noble*, the parts of it that are material have been so often read that it is unnecessary for me to repeat them; the Court of King's Bench are there of opinion, that a licence legalizing the adventure, gives the means of prosecuting all the rights which arise out of that adventure. I have another case which shews what rights may be acquired by the subjects of states in hostility. *Fenton and Another, Assignees of Rennards, Bankrupts*, v. *Pearson*, 15 *East*, 419.; the marginal note is, "A trading licence "from the crown to *British* merchants to send a ship "in ballast to an enemy's port, there to receive and "load a cargo, and import it into this country, by "legalizing the purchase by the subject, legalizes the "sale by the enemy, and impliedly legalizes the vendor "enemy's right to stop the goods *in transitu* after their "arrival in port here, upon the intermediate insolvency "of the vendees, after a part payment only, (which "was offered to be refunded,) and also to employ an "agent here for that purpose." Now, to follow the right of stopping *in transitu*, it will result, that if the

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Russian consignor had a right to stop the goods, he might bring an action for them, for it would be ridiculous to hold that he had a right to stop *in transitu*, unless he might enforce that right by an action, if impeded in the exercise thereof. Without going minutely into detail, therefore, it suffices to say, that under this licence, *Russian* subjects were at liberty to import their goods into this country; and if a *Russian* subject had a right to import those goods, he had therefore a right to insure them, and to bring actions to enforce that contract; the consequence is, that the verdict, which in this case has been found for the Plaintiff, must stand, and the

Rule must be discharged.

REGULA GENERALIS.

IT IS ORDERED, That from henceforth bail in this Court shall justify at the sitting of the Court only, and at no other time, except on the last day of term, when bail, who may have been prevented from attending at the sitting of the Court, shall be permitted to justify at the rising of the Court.

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